San Francisco Law Library

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 8832

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
C. S. HUTSON & COMPANY,
Bankrupt.

C. S. HUTSON,
Appellant,

vs.

S. J. COFFMAN, Trustee in the matter of
C. S. HUTSON & COMPANY, Bankrupt,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
C. S. HUTSON & COMPANY,
Bankrupt.

C. S. HUTSON,
Appellant,

vs.

S. J. COFFMAN, Trustee in the matter of
C. S. HUTSON & COMPANY, Bankrupt,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Solicitors.

For Appellant:

ROBERT B. POWELL, Esq.,

354 South Spring Street,

Los Angeles, California.

For Appellee:

GERALD WILLIS MYERS, Esq.,

307 South Hill Street,

Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	:	In Bankruptcy
	:	No. 23748-C
C. S. HUTSON & COMPANY,	:	
	:	CITATION
Bankrupt.	:	ON APPEAL

UNITED STATES OF AMERICA—SS.

The President of the United States of America to S. J. COFFMAN, Trustee in the matter of C. S. HUTSON & COMPANY, BANKRUPT, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California within thirty (30) days from the date hereof, pursuant to an order allowing an appeal of record in the office of the Clerk of the above entitled Court wherein C. S. Hutson is the Appellant, and you are the Appellee, to show cause, if any there be, why the order made and entered herein by the above entitled Court on June the 24th, 1937, affirming the order of Hugh L. Dickson, Referee in Bankruptcy in the above entitled proceedings,

made on April the 13th, 1937, disallowing the general claim of C. S. Hutson filed herein in the sum of $7400.54, should not be reversed and said claim be allowed.

WITNESS the Honorable GEO. COSGRAVE, United States District Judge for the Southern District of California this 23d day of July, 1937.

Geo Cosgrave
District Judge

[Endorsed]: Received copy of the following papers, Citation on Appeal, Order Allowing Appeal, Petion for Appeal, Assignment of Errors, this 23rd day of July, 1937 Gerald Willis Myers Attorney for S. J. Coffman (Trustee) Appellee Filed R. S. Zimmerman, Clerk at 39 Min. past 12 o'clock, Jul. 24, 1937 P. M. By F. Betz, Deputy Clerk.

PROOF OF UNSECURED DEBT
(Form 31)

In the District Court of the United States
Southern District of California
Central Division

In the Matter of	)	23748-C
C. S. Hutson & Company,	)	In 77 B
Bankrupt	)	

At Los Angeles, Cal., in said Central District of California, on the 5th day of Dec., A. D., 1934, came C. S. Hutson, of Los Angeles, ... in the County of Los Angeles, and State of California, in said District of California, and made oath and says:

If Individual Omit These Paragraphs

CORPORATION

That he is ..... treasurer of ....., a corporation incorporated by and under the laws of the State of ....., and carrying on business at ....., County of ....., State of ....., and that he is duly authorized to make this Proof of Debt and Attached Letter of Attorney.

PARTNERSHIP

That he is a member of the firm of ...., a copartnership consisting of himself and ....., that he executed the subjoined letter of attorney on behalf of said copartnership; and that he is authorized thereto by said copartnership on whose behalf he acts.

That the said C. S. Hutson & Company the corporation whom a petition for 77-B has been filed, was at and before the filing of said petition, and still is, justly

and truly indebted to the said deponent in the sum of Seven Thousand Four Hundred & 54/100 ($7400.54) Dollars; that the consideration of said debt is as follows:

Services rendered

.....

goods, wares and merchandise sold and delivered within two years last past by the claimant, an itemized bill of which, marked Exhibit "A", is hereto annexed and referred to as a part hereof .....

.....

.....

that no part of said debt has been paid; .....

.....

.....

no note has been received for said indebtedness, nor for any part thereof, nor has any judgment been rendered thereon, except as hereinabove stated; that there are no set-offs or counter-claims to the same except a note for $4126.88

.....

and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever.

C. H. HUTSON

Creditor

916 No. Edgemont

Subscribed and Sworn to before me this 5 day of Dec., 1934

Victor Ford Collins

[Endorsed]: Filed Dec. 5, 1934 at 10 o'clock A. M. Earl E. Moss, Referee Phyllis Gray Clerk. Filed R. S. Zimmerman, Clerk at 4 min. past 4 o'clock Apr. 20, 1937 P. M. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF OBJECTION TO ALLOWANCE OF CLAIM.

To C. S. Hutson and to his Attorney, Robert B. Powell, YOU, AND EACH OF YOU, will please take notice that S. J. COFFMAN, the Trustee in the above-entitled estate objects to the allowance of your claim heretofore filed in the sum of $7400.54 upon the following grounds:

1. That the records of said bankrupt are incorrect in that the true records of the bankrupt show that it is not indebted in any sum whatsoever but that you are indebted to the corporation in a sum in excess of $25,000.00.

2. That your purported claim arises out of fictitious sales of property and corresponding book entries therefor, wherein you attempted to sell to the bankrupt a one-fourth interest in the American Bank Check Company, receiving credit on *you* personal account for $25,000.00 although having no interest in said company to sell and no evidence thereof ever delivered to the bankrupt.

3. Fictitious entries of salary to H. L. Hutson since 1928, the credit thereof having been applied to your personal account.

DATED: October 20, 1936.

Gerald Willis Myers
Attorney for Trustee

[Endorsed]: Filed Oct. 20, 1936 at 2 o'clock P. M. Hugh L. Dickson, Referee, C. M. Commins Clerk C. M. C. Filed R. S. Zimmerman, Clerk at 4 min. past 4 o'clock Apr. 20, 1937 P. M. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

ORDER DISALLOWING CLAIM OF C. S. HUTSON.

The Trustee's objection to the claim of C. S. Hutson came on regularly for hearing April 12, 1937, at Two O'clock, P. M., before Honorable Hugh L. Dickson, Referee in Bankruptcy, and evidence having been introduced in support of and in opposition to the allowance of said claim and said matter having been fully considered by the Referee;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the claim of C. S. Hutson in the sum of $7400.54 be disallowed and expunged from the list of claims upon the Trustee's record in said matter.

DATED: April 13th, 1937.

Hugh L Dickson
Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman Clerk at 4 min. past 4 o'clock Apr. 20, 1937 P. M. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

PETITION TO REVIEW ORDER OF REFEREE

TO THE HONORABLE HUGH L. DICKSON,
REFEREE IN BANKRUPTCY:

Comes now C. S. Hutson and, through his attorney, files this his petition to review the order of Referee Hugh L. Dickson, said ordering disallowing the claim of C. S. Hutson filed in the above entitled matter in the sum of $7400.59, said order having been signed on April 13, 1937. Said petition for review is based on the following grounds, to-wit:

I.

The Referee erred in disallowing the claim.

II.

The Referee erred in allowing evidence to be introduced in the form of a transcript of proceedings held in San Francisco, said proceedings having not been brought on in the presence of C. S. Hutson or his counsel and with no notice to the said C. S. Hutson.

WHEREFORE, your petitioner prays that said order be reviewed and that an order be made and entered herein by the above entitled Court allowing the said claim of petitioner in the sum of $7400.59.

Robert B. Powell
Attorney for C. S. Hutson

[Endorsed]: Filed Apr. 14, 1937 at 50 min. past 3 o'clock P. M. Hugh L. Dickson, Referee C. M. Commins, Clerk C. M. C. Filed R. S. Zimmerman, Clerk at 4 min. past 4 o'clock Apr. 20, 1937 P. M. By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW.

I, HUGH L. DICKSON, one of the Referees in Bankruptcy, do hereby certify that in the course of the proceedings in the above entitled matter before me the following questions arose pertinent to the said proceedings.

I.

A claim was filed in these proceedings by C. S. Hutson in the sum of $7400.54.

II.

Objections were filed to the claim by S. J. Coffman, Trustee of the bankrupt estate.

III.

The hearing was had on said objections on Monday, April 12, 1937, at the hour of 2:00 o'clock, P. M. thereof, and evidence was introduced by the said Trustee, at which time an order was made disallowing the claim.

IV.

For the information of the court I hand up herewith the reporter's transcript which is quite brief, and since the petition to review involves the effect of testimony and the admissibility of evidence, I believe that the reviewing court should construe the entire transcript.

V.

For the information of the Court I hand up herewith the following documents:

1. Proof of claim filed by C. S. Hutson
2. Objection to claim filed by S. J. Coffman, Trustee
3. Order*ing* disallowing claim
4. Petition for review.

DATED this 16th day of April, 1937.

Hugh L. Dickson
Referee in Bankruptcy.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 4 min. past 4 o'clock Apr. 20, 1937 P. M. By M. J. Sommer, Deputy Clerk.

At a stated term, to-wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court room thereof, in the City of Los Angeles on Thursday the 24th day of June in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable: GEO. COSGRAVE District Judge.

In the Matter of)

C. S. HUTSON & CO.,) No. 23748-C

Bankrupt.)

The petition for review is denied and findings and order of the referee confirmed.

Exception to petitioner.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR COURT TO RECONSIDER PETITION TO REVIEW REFEREE'S ORDER AND TO SET ASIDE ORDER CONFIRMING REFEREE'S ORDER

TO S. J. COFFMAN AND TO HIS ATTORNEY, GERALD WILLIS MYERS:

You and each of you will please take notice that C. S. HUTSON will appear before the above entitled Court on Tuesday, July 6, 1937, at the hour of 10:00 a. m. thereof, and petition the Court to review the Referee's ruling denying the claim of C. S. Hutson filed herein, and to reconsider the order of the above entitled Court made on June 24, 1937 affirming the findings of fact and order of the Referee.

DATED: June 30, 1937.

Robert B. Powell
Attorney for C. S. Hutson

[Endorsed]: Received copy of the within this 30 day of June, 1937, E. Crookston for G. W. Myers. Filed R. S. Zimmerman, Clerk at 34 min. past 1 o'clock Jul. 2, 1937 P. M. By M. J. Sommer, Deputy Clerk.

At a stated term, to-wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the Sixth day of July, in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

The Honorable: GEO. COSGRAVE District Judge.

In the Matter of	)	
	)	
C. S. Hutson & Co.,	)	No. 23748-C Bkcy
	)	
Bankrupt.	)	

This matter coming on for hearing on petition of C. S. Hutson to review the Referee's ruling denying the claim of C. S. Hutson herein, and to reconsider the order of the court made on June 24, 1937, affirming the findings of fact and order of the referee pursuant to notice of motion filed July 2, 1937; Robert B. Powell, Esq., appearing for C. S. Hutson, argues; Attorney G. W. Myers argues; the Court makes a statement; Attorney Powell argues further; the Court now orders that said Petition be denied, and exception allowed.

[Title of District Court and Cause.]

STIPULATION

IT IS HEREBY STIPULATED by and between Appellant and Appellee in the above entitled matter that the Transcript which is a part of the Statement of Evidence ordered by the Honorable George Cosgrave, United States District Judge, was prepared as follows:

That S. J. Coffman, Trustee for C. S. Hutson & Company, a corporation, Bankrupt, petitioned the District Court for an order authorizing the institution of ancillary proceedings in San Francisco. That pursuant to the order of the said District Court proceedings were had before Burton J. Wyman, as Special Master. That the evidence is correctly transcribed in the Statement of Evidence which is a part of the Record of these proceedings.

Dated this 13 day of April, 1938.

Robert B. Powell
Attorney for Appellant

Gerald Willis Myers
Attorney for Appellee

[Endorsed]: Filed Apr. 13, 1938 at 55 min. past 4 o'clock P. M. R. S. Zimmerman, Clerk M. J. Sommer, Deputy.

[A STATEMENT OF EVIDENCE]

[Title of District Court and Cause.]

ORDER ON STATEMENT OF EVIDENCE

C. S. Hutson, the appellant in the above entitled matter, having prepared his statement of evidence, and objections to said statement of evidence having been duly prepared and filed by the appellee, S. J. Coffman, and a hearing having duly come on before the undersigned on Monday, March 28, 1938, at the hour of 10:00 a. m. thereof, and it appearing to the Court that all of the testimony introduced in the hearings herein before the referee in bankruptcy is pertinent to the proceedings, and it further appearing that it should be reproduced in the exact words of the witnesses,

IT IS HEREBY ORDERED that an exact copy of the Reporter's Transcript taken of Hearing on Objection to Claim of C. S. Hutson on April 12, 1937, be filed as a statement of evidence in this proceeding.

And it further appearing that there was introduced at the said proceedings a Reporter's Transcript of the testimony of H. L. Hutson taken before Burton J. Wyman, Special Master in Bankruptcy in the Matter of C. S. Hutson, Bankrupt, No. 23748, at San Francisco, California, on Thursday, September 17, 1936; and it appearing that it is necessary for a complete understanding of the matter that said Reporter's Transcript be reproduced in the exact words of the witnesses,

IT IS HEREBY ORDERED that the Statement of Evidence be and it hereby is settled, and that said Statement of Evidence include the following documents:

1. Entire Reporter's Transcript of Hearing on Objection to Claim of C. S. Hutson on April 12, 1937.

2. Reporter's Transcript of the testimony of H. L. Hutson taken before Burton J. Wyman, Special Master in Bankruptcy in the Matter of C. S. Hutson, Bankrupt, No. 23748, at San Francisco, California, on Thursday, September 17, 1936.

DATED this 7th day of April, 1938.

Geo Cosgrave
U. S. District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 34 min. past 2 o'clock Apr. 7, 1938 P. M. By M. J. Sommer, Deputy Clerk.

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

—oOo—

BEFORE: HONORABLE BURTON J. WYMAN, REFEREE IN BANKRUPTCY, SPECIAL MASTER

: :

)

In the Matter of

)

C. S. HUTSON No. 23748

)

Bankrupt

)

: :

THURSDAY, SEPTEMBER 17, 1936

APPEARANCES:

Gerald W. Myers, Esq., Attorney for S. J. Coffman, Trustee;

Messrs. John L. McNab and S. C. Wright, Attorneys for C. S. Hutson and American Bank Check Co.

THE MASTER: This is a hearing in the matter of C. S. Hutson.

MR. MYERS: If your Honor please, Mr. Wright and I and Mr. Coffman, Trustee, and Mr. Hutson went over to the plant this morning and checked over the records. And, rather than stipulate what the records disclosed, we asked Mr. Hutson to be here to merely make a statement as to our investigation. Mr. Hutson is here.

(Testimony of Harman L. Hutson)

THE MASTER: Very well, Mr. Hutson will take the stand.

HARMAN L. HUTSON

Called for the Trustee SWORN

THE MASTER: Your full name is what,

A Harman L. Hutson. H-a-r-m-a-n.

MR. MYERS: Q Mr. Hutson, you are the father of C. S. Hutson?

A Yes, sir.

Q And during the year of 1928 up to approximately the month of April you were employed by C. S. Hutson Company in Los Angeles?

A Yes.

Q In 1928, in April, you moved to San Francisco?

A In August.

Q In August, 1928. And you operated what is known in San Francisco as the American Bank Check Co.?

A Yes.

Q That company, at the inception, was a partnership between yourself and C. S. Hutson?

A I think not until after I come up here. C. S. was operating it himself in San Francisco.

Q In San Francisco. And then you came up in August, 1928; then after you came up it was operated as a co-partnership?

A Yes, sir.

Q Until what time? A. Well, some time in 1931.

Q And then in 1931 the partnership was dissolved, in order to settle certain financial obligations between yourself and your son, whereby you were to get all his interest in the American Bank Check Co. in cancellation

of certain money which you had loaned or advanced to him, is that correct?

A Correct.

Q And since 1931 you have operated all this business as your own? A. I have.

Q Not as a co-partnership? A No.

Q It has been owned and controlled exclusively by yourself?

A Yes.

Q No other partner in it? A No.

Q It has been operated as a fictitious name?

A Yes.

Q In 1928, after you left C. S. Hutson Company and came up to San Francisco, you operated the American Bank Check Co. and you did not draw any salary from C. S. Hutson Company in Los Angeles?

A. No.

Q And from August, 1928 up to and including the present time you have never drawn any salary from them?

A I have not.

Q You have received no dividends from C. S. Hutson Company during the same period of time? A. I have not.

Q And you are still a stockholder in C. S. Hutson Company?

A I have got some stock; yes.

Q Approximately 170-odd shares?

A 171 shares. I think it is supposed to be worth $10 apiece.

Q You are not an officer in that company? A. No.

Q. And you were previously? A. Yes.

Q When did you cease to be an officer?

A When I come up here.

(Testimony of Harman L. Hutson)

Q In August, 1928? A Yes.

Q From that time on, the only connection you have had with the C. S. Hutson Company was as stockholder?

A Yes—well, we have had business relations back and forth.

Q But you are not an officer or a director; you are merely a stockholder? A That's right.

Q When, Mr. Hutson, was the first time that you had any information that the C. S. Hutson Company, on its books, reflected an investment of 25 per cent interest in the American Bank Check Co.?

A That I couldn't tell. The information was brought to me but I don't remember what was the date.

Q Was it a year or more than a year ago?

A It was more than that. I expect it was two years ago, about.

Q And did you have any information or knowledge at the time the matter was set up on the books as to this 25 per cent interest?

A I didn't know anything about it until some time later. The information came, I think, through my son.

Q After it was all done. And did you ever maintain that a 25 per cent interest, or was it ever your conception that a 25 per cent interest in the American Bank Check Co. was worth $25,000?

A I had no such conception at all.

Q What would be the total valuation of the American Bank Check Co.?

A What do you mean, now?

Q No; during approximately the year 1929 or 1930 or 1931, during that period of time?

A Well, somewhere around 20 or 25 thousand dollars.

(Testimony of Harman L. Hutson)

Q That would be the total value?

A Yes.

Q And has that valuation increased from that time, or has it decreased?

A Increased somewhat; not a great deal.

Q In other words, it rose from the adding of new machinery and equipment, but the old has deteriorated?

A We added some new machinery since that time. That would increase its value somewhat.

Q Now, at the time you were informed that the company in Los Angeles, referring to the C. S. Hutson Company, had set up on their books a valuation of $25,000 for a 25 per cent interest in your company—you say that information came from your son?

A I think so, yes.

Q Did you have any conversation with your son with respect to that matter as to why the matter was set up as $25,000?

A I did not.

Q Did he make any statement to you as to why?

A I don't think he ever gave me any information on it, but he did state to me that one-fourth interest—in other words, one-half of his interest—had been transferred to the company. And I didn't think that was possible, as he had no interest, had nothing to transfer.

Q Did you have any conversation, or did Mr. C. S. Hutson have any conversation with you, that why he charged the company that interest was in order to offset a personal indebtedness of his?

A He didn't say that to me.

Q He never made any statement about that?

A No.

(Testimony of Harman L. Hutson)

Q Did he ever show you the books as to what had been set up? A No.

Q He merely came up to you on one of his trips up here and told you what had been done? A Yes.

Q With respect to the original purchase of the machinery and equipment in the American Bank Check Co., you will recall that this morning I showed you the ledger of the C. S. Hutson Company, in which they reflected that the C. S. Hutson Company had purchased for the American Bank Check Co. various pieces of equipment and machinery, beginning in March of 1928 and up until December, 1928, at which time they show an advance by C. S. Hutson Company to the American Bank Check Co. of approximately $4,989.57?

A Let me correct you, Mr. Myers, a little bit. That was not one of the ledgers of C. S. Hutson & Company that you showed me.

Q Yes, Mr. Hutson, that was the one I brought up from the south.

A It was our ledger from here that some way or other got down there.

Q Included in that entire ledger are all the books of the C. S. Hutson Company that were records of the Trustee that were turned over by Mr. C. S. Hutson.

A That ledger you showed me was our original ledger.

Q You mean just the sheet I showed you?

A No; that book and all those. It must be that C. S. took it down there. We set up a new set of books under the supervision of a certified public accountant. He put in a system of bookkeeping for us and we started in with that.

Q Well, as I recall, Mr. Hutson, our conversation this morning with respect to that account—I may be in error

but I want to clarify my own mind as to this situation—I believe you stated that you were under the impression that this company had paid all its own bills and C. S. Hutson had never paid any bills for the machinery?

A That isn't exactly correct. I paid practically all the bills. As a matter of fact, I have paid all of them. They rendered a bill to me, which I paid them.

Q That was paid by a check from the American Bank Check Co.?

A Yes.

Q During this entire period of time, since August, 1928 up until the present time, you have had various accounts between the American Bank Check Co. and C. S. Hutson Company for purchases you had made back and forth, and credits and payments back and forth, as between the two of you?

A Yes.

Q And do you recall, or is it your best information, that in the payment of the money, whatever money C. S. Hutson advanced for the purchase of equipment at the inception of the American Bank Check Co., that that account was included in this open current account between your two companies and eventually was paid off? Or did you pay it off in one check for all the money that he advanced?

A I paid several of those—most of the bills for machinery and things were paid direct to the people it was purchased from by one check, and my recollection is it was $980.

Q Do you recall the amount of the original investment in the American Bank Check Co.?

A Somewhere around $13,000 or $14,000.

(Testimony of Harman L. Hutson)

Q I don't mean by that how much was purchased on these contracts. I mean how much money it was started with.

A Just a shoe string.

Q It started on just a shoe string. In other words, you bought on contract and kept the payments up?

A Yes.

Q Have you any recollection of the amount of money you originally started with, the original down payments that were advanced on the machinery?

A They were made before I came up in August. Whatever down payments was made before that, and I had to settle for them afterward. I had to reimburse those that had been paid.

Q I think, Mr. Hutson—did I ask you whether or not, from the time of August, 1928 up to the present time—the time when you moved to San Francisco, from that time you did not draw any salary from the C. S. Hutson Company?

A No.

MR. MYERS: I think that is all.

CROSS EXAMINATION

MR. McNAB: Q Just a few questions. I understood you to say on direct examination that you owned 171 shares of the C. S. Hutson Company, a corporation, is that correct?

A Correct.

Q Now, did you subscribe for any of that stock?

A No.

Q How did you acquire that stock?

A Well, by gift. We were living in Michigan when Charley started in business down there, in 1917. He

made a present to his mother and me, each of us 150 shares apiece, with a value of $10.

Q And you were living in Grand Rapids, Michigan, at that time? A Yes.

Q Do you recall which year that was?

A I think 1917.

Q Now, with reference to the 21 shares of stock, how did you obtain that?

A That come in the way of stock dividends.

Q As stock dividends. And that was given to you by whom?

A C. S. Hutson.

Q When did you sever your official connection with C. S. Hutson Company?

A When I come up here. I believe it was August, 1928.

Q What previous position did you hold in that company?

A I was vice-president.

Q Did you tender your resignation in writing?

A No.

Q Did you tell anyone that you were resigning?

A I don't think so. But the very next—I think it was in October that they had their annual meeting and elected someone else in my place.

Q Do you recall who that was? A No.

Q And now, Mr. Hutson, since August of 1928 down to the present time where have you lived?

A In San Francisco.

Q You have been living here all of that time?

A Yes.

(Testimony of Harman L. Hutson)

Q I understood you to say on direct examination that your son originally started the American Bank Check Co. Is that correct? A Correct.

Q Do you recall what month and year that was?

A I can only tell you that it commenced operation in April.

Q 1928?

A And they probably were busy accumulating machinery and things like that for quite a few months or more prior to that.

Q You heard counsel ask you whether or not it was originally a co-partnership?

A It was not originally.

Q It wasn't originally?

A C. S. started this thing alone and it wasn't a partnership until after I came up here.

Q Counsel also asked you something about a dissolution of partnership. Did you understand what he meant by that?

A I meant that C. S. and I had some dispute in regard to a claim that he owed me.

Q Will you kindly state to his Honor and for the benefit of the record just what that discussion or dispute was?

A C. S. Hutson owed me some money personally and I wanted an adjustment made of it. It had been running along several years and I wanted it adjusted and I fussed along with it a long time trying to get an adjustment, and finally I told him I was going to take all his one-half interest in the American Bank Check Co. and hold it until he did something about adjusting my claim.

(Testimony of Harman L. Hutson)

Q Did your son make any objection to that?

A He didn't think that was the right thing for me to do, but I said, "I got enough. This thing has got to be adjusted."

Q Has your son ever participated in the business since you took it over—was that August, 1928 that you took it over?

A I took it over myself in 1931.

Q Now, from 1931, from the time you took over the business, have you consulted your son as to how the business is to be operated? A Absolutely no.

Q Has he had anything to do with the operation of the business? A No.

Q Has he protested or said that you did not have the right to run that whole business? A Yes.

Q Has he ever paid any of the bills? A Nothing.

Q. Has he ever rendered any accounts to you?

A No.

Q Has he demanded that you account to him?

A No, he never has.

Q So far as that business is concerned, who has carried on the dealings with the trade here in the City and County of San Francisco? A I have done it all.

Q You paid all the bills? A Yes.

Q Employed all the help? A Yes.

Q And discharged the help, if necessary A Yes.

Q You have never consulted anybody else?

A No.

Q And from 1931 to the present time you have always believed, and you still believe, that you are the sole and exclusive owner of that business, is that correct?

A Yes.

MR. McNAB: That is all.

(Testimony of Harman L. Hutson)

REDIRECT EXAMINATION

MR. MYERS: Q. May I ask one further thing: With respect to this situation, where you stated at the time you made this adjustment with Mr. Charley Hutson, you told him you were going to take over his interest and hold it until he straightened out the old debt, did you take it over and hold it—

A (Interrupting) I think I told him I would hold it until some adjustment was made.

Q Was there any further talk about it?

A We talked about it several times, but there has never been any adjustment made.

Q In order to make myself clear: Do you maintain that you are merely holding that interest?

A I maintain now I own it because he didn't make any adjustment. I said I wanted any adjustment made and I said, "If you don't I am going to take over and hold it as my own," which I have done.

Q About what time, what date, do you consider that you took over the business and run it as your own and not just hold it as an adjustment?

A Well, there has never been an adjustment. I took it over in 1931, I think in July, 1931, and have held it ever since.

Q And at the inception you were going to hold it until an adjustment was made?

A That was the talk I had with him. He has never come across with an adjustment.

(Testimony of Harman L. Hutson)

Q Did you ever, at any time notify him you were taking it over completely?

A Nothing more than that.

Q Nothing more than that original conversation. But you maintain that since 1928 you are the sole—since 1931 that you are the sol*d* and exclusive owner of the American Bank Check Co. and that Mr. C. S. Hutson, or C. S. Hutson Company, never have had any interest whatsoever in this American Bank Check Co. since that time on?

A No.

Q Do you maintain that the C. S. Hutson Company owes you any money?

A No, I don't think there is anything. I haven't the bills. If it does it belonged to my son and not to me, because when I took that over I cancelled all the accounts he had.

Q In other words, you took over the American Bank Check Co. in 1931 in full settlement of any money your son or C. S. Hutson Company owed it?

A Yes.

RECROSS EXAMINATION

MR. McNAB: Q Mr. Hutson, is it or is it not a fact that in 1931 you had a certified public accountant come into your place of business and set up some books for you?

A I am certain he set up the books, but I don't remember that date exactly.

Q But you did have a set of books? A Yes.

Q In 1931 A Yes.

(Testimony of Harman L. Hutson)

Q And you maintained that set of books until the present time? A. Until the present time.

Q Are those books in your possession now?

A Yes.

Q And have been since that time? A Yes.

Q Do you recall the name of that certified public accountant? A Charles Ringold.

Q Where is his place of business, or where was it at that time?

A He was here at the time. He is in the east now. The last I heard he was in Detroit.

Q Do you recall where his office was in San Francisco?

A He come down to our place here.

Q And set up these books for you? A Yes.

Q. You are operating under that system ever since?

A Yes.

MR. McNAB: T*H*at is all.

MR. MYERS: That's all.

THE MASTER: Mr. Myers, I suppose you will take care of the reporter's fees? You want this written up?

MR. MYERS: Yes.

MR. McNAB: And I would like a copy.

[Endorsed]: Filed Dec 7 - 1936 at ..... min. past 10 o'clock A. M. Hugh L. Dickson, Referee C. M. Commins, Clerk C D Filed Apr 13 1938 at 55 min. past 4 o'clock P. M. R. S. Zimmerman, Clerk M J Sommer Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF HEARING ON OBJECTION TO CLAIM OF C. S. HUTSON, ON APRIL 12, 1937.

APPEARANCES:

For the Trustee: GERALD W. MYERS, Esq.

For the Claimant, C. S. Hutson: ROBERT B. POWELL, Esq.

—oOo—

LOS ANGELES, CALIFORNIA, APRIL 12, 1937.
2:00 P. M.

—oOo—

THE REFEREE: In the matter of C. S. Hutson & Company. Is Mr. Hutson here, Mr. Powell?

MR. POWELL: No, I would like the record to show that I informed him this morning that we would go on with the matter at 2:00 o'clock, whether he was here or not.

THE REFEREE: All right.

MR. MYERS: There are two matters, one is the order to show cause of Mr. Hutson himself, on the Trustee.

THE REFEREE: What do you want to do about that?

MR. POWELL: We will proceed on both of them.

MR. MYERS: Which one do you want to proceed on first?

MR. POWELL: On the claim first. We will proceed first on the Trustee's objection to the claim. And then this evidence that is produced on the objection to the claim will not be applicable to the petition of Mr. Hutson.

(Testimony of Mr. Gosling)

MR. MYERS: What do you mean by applicable?

THE REFEREE: Well. let's get started.

MR. MYERS: Mr. Gosling, come forward.

THE REFEREE: We are now on the objection to the claim of Mr. Hutson, in the sum of seventy-five hundred dollars.

MR. GOSLING

called as a witness on behalf of the Trustee, having been first duly sworn by the Referee, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MYERS:

Q Mr. Gosling, you were auditor and in charge of the books of C. S. Hutson & Company for what period of time?

A 1931, 1932, 1933 and 1934.

Q And had the books in your possession at that time, and you were keeping charge of those books?

A Yes, sir.

MR. POWELL: Was that the time, in 1931, when you started in the employ of Hutson & Company?

A I don't remember whether it was 1930 or 1931. I started in November, I think, but I don't know which year it was.

BY MR. MYERS:

Q In your duties as auditor of this company, did you have access to the C. S. Hutson books for all of the period of time?

A All that were in my possession.

(Testimony of Mr. Gosling)

Q Did you have access to all the books that were back of that in 1926, 1927, 1928 and 1929?

A There were a lot of books missing in the old days, and I couldn't tell you.

Q I show you what purports to be the journal and ask you if you recognize that?

A Yes, I recognize it.

Q Now, calling your attention particularly to an item in the journal of 1929—

THE REFEREE: Did you keep those books? Do you know anything about those books, having been the auditor of the company?

A Yes, sir.

THE REFEREE: The one you have in your hand?

A Yes.

THE REFEREE: All right.

BY MR. MYERS:

Q That's one of the books of the C. S. Hutson & Company?

A Yes, sir.

Q That's the journal?

A Yes, sir.

Q Calling your particular attention to items, journal entry No. 222 and 223, that is December 31, 1929.

A I can't find that number here.

Q Do you find any journal entry for December 31, 1929?

A Journal entry 1994 and 1993 and 1994-A.

Q Was there a date there December 31, 1929 in that journal?

A Are you talking about the page number or journal entry number?

(Testimony of Mr. Gosling)

Q It says journal number.

A No.

Q Do you have the date in December 1929?

A Yes, December 29, 1929.

Q Do you find December 31, 1929?

A There is no December 31 here.

Q Do you find an entry in the end of December, 1929, in which the sum of $6,371.19 was credited to Mr. C. S. Hutson's personal account, and charged against the salary of H. L. Hutson?

MR. POWELL: Mr. Gosling, you didn't keep the books as of December 31, 1929, did you?

A Yes, this is my handwriting.

MR. POWELL: Then you were mistaken when you said you came there in 31?

A Yes, I didn't know it.

MR. POWELL: Refreshing your recollection, could you clear that up and advise when you came there?

A I think I can tell you the first journal I wrote, and that will tell you the tale. It looks to me like I came in September, 1928, here is my handwriting.

BY MR. POWELL:

Q September, 1928?

A Yes, sir.

Q How long have you lived in Los Angeles?

A Since 1923.

Q What business were you in in 1923?

A I came down here from Fresno, I was in the public accountant business. Do you mean 1923?

Q Yes.

A I couldn't tell you.

Q Were you a certified public accountant?

A No.

(Testimony of Mr. Gosling)

Q Did you ever have your own firm or place of business?

A Yes.

Q And did you do any work for the Hutson Company when you had your own business?

A No.

Q The only connection you had with the Hutson company was as an auditor?

A That's right.

Q And you now state that you were employed by the Hutson Company in 1928?

A It must have been, that's when I see my handwriting here, September 1928.

Q Could it be possible that you had made those entries in the books in 1930 and 1931, and dated them back as of 1928?

A No, I don't do that.

Q Have you ever done that while you were connected with the Hutson Company?

A Not to my knowledge.

Q Isn't it a fact that for a time the Hutson books were not kept in shape and then postdated?

A Not that I know of. They might have been previous to my time. Not that I know of.

Q Your best recollection is now that if that entry bears date 1928 or 1929 you made it on that date?

A Well, during that month. Yes, these entries were all made generally at the end of the month.

Q Can't you refresh your recollection as to the date 1928 or 1929 and give us an answer as to whether you were employed by the Hutson Company in 1928 or 1929?

A I must have been, because here in 1928, in September, is my handwriting.

(Testimony of Mr. Gosling)

MR. MYERS: Does your handwriting follow right along?

A Yes.

BY MR. POWELL:

Q In May 1927 you were not here?

A No.

Q Let's turn over here to your handwriting.

A Yes.

Q That's your handwriting there (indicating)?

A Yes.

Q And this is Simmons'?

A Yes.

Q So evidently the first entry you made would be in September of 1928?

A That's right.

Q Your best recollection is those entries were made in September of 1928?

A That's right.

THE REFEREE: These are Mr. Hutson's books. I don't see how you can question the accuracy of his own books. When he files a claim here in this manner, based upon his books, it doesn't seem to me he can attack his own books.

BY MR. MYERS:

Q Do you find the entries as of December 31, 1929, in which a charge was made to H. L. Hutson's account of $6,371.19, and credited to Mr. C. S. Hutson's personal account?

A There is a journal entry here which gives Mr. Hutson credit of $6,371.19, and charged against H. L. Hutson of $10,290.29.

(Testimony of Mr. Gosling)

THE REFEREE: Who is H. L. Hutson?

A That was his father, the father of C. S. Hutson.

Q Now, what was the credit?

A Credit to Mr. C. S. Hutson was $6,371.19.

BY MR. MYERS:

Q What was the journal explanation as to those items?

A There is not any.

Q Do you know of your own knowledge what that item of $6,371.19 credited to Mr. C. S. Hutson's personal account represented?

MR. POWELL: Just a second before that. I don't find any conversations you might have had with Mr. Hutson or Mr. H. L. Hutson. Let's lay the foundation as to how he might have acquired any knowledge.

THE REFEREE: Do you know anything from what C. S. Hutson told you as to how it was that he took credit for sixty-three hundred odd dollars, and charged his father, H. L. Hutson, with ten thousand dollars? Do you know how that came about?

A Well, it was an old deal. I can't tell exactly.

Q This was what C. S. Hutson told you?

A Yes.

BY MR. POWELL:

Q Let's see if you can give the words, if possible?

A I can't tell you that.

BY MR. MYERS:

Q You can tell the gist of it, can't you?

A There was some kind of a thing between the American Bank Check Company, who owed the company money, and Mr. H. L. Hutson, who he had on the pay

(Testimony of Mr. Gosling)

roll. It was an old mixed up account, I couldn't tell you how many years it went back. He decided to wipe it out. In other words, he credited his account and credited himself, and let it go at that.

BY MR. MYERS:

Q What was the balance of that $10,000 credit?

A Then we credited the American Bank Check Company for $3,919.10.

Q And $6,371.19 to Mr. C. S. Hutson's personal account?

A Yes.

Q Who owed the account of ten thousand two hundred some odd dollars, what was that charged against? Who had the credit for that amount of money?

A H. L. Hutson. That's my recollection of it.

MR. POWELL: That's what the books say, isn't it?

A Yes.

BY MR. MYERS:

Q What does that journal entry refer to now? What book would you have to have to show who had the credit for that amount?

A I would have to look at the general ledger.

Q For what year?

A For 1929.

THE REFEREE: Let me ask you a question for my own information. When a man hires out as a bookkeeper for a company, for any kind of concern, is it customary for him to make entries in a set of books without any knowledge as to the source from which the charge is made? Do you have any written bills or statements of

(Testimony of Mr. Gosling)

any sort, or do you just enter into the book whatever happens to come into your mind?

A Oh, no.

Q How do you keep books anyhow?

A From records.

Q There was no record of this $10,000 transaction, was it?

A I am trying to find out now. I don't remember, that was nine years ago.

BY MR. MYERS:

Q Mr. Gosling, calling your attention to the journal, which is listed 223, being December 29th—

MR. POWELL: Is that in his handwriting?

BY MR. MYERS:

Q Is that your handwriting?

A Yes.

Q Does the entry beginning Investment Account $18,000; American Bank Check Company, C. S. Hutson, $10,100; C. S. Hutson, and so forth, $7900 per resolution Board of Directors, December 17, 1929, C. S. Hutson & Company purchased from C. S. Hutson 18 per cent of the American Bank Check?

A All of that has some bearing on it. There was a resolution passed by the Board of Directors. We had the minute book—if I had that minute book I could probably tell you.

Q The first purchase was an 18 per cent interest in that company, is that right?

A That's right.

Q And that 18 per cent interest represented how much money?

A $18,000.

(Testimony of Mr. Gosling)

Q And the $18,000 was charged to the Investment Account as a credit in the Investment Account of $18,000, representing an 18 per cent interest in the American Bank Check Company?

A That's right.

Q And the $18,000 was then charged against or credited rather to Mr. C. S. Hutson of $10,100, and $6,371.19; is that right?

A No, there was $10,100 credited to C. S. Hutson, his open account, and $7,900 was credited to his notes receivable account.

Q So that that transaction would show, from your books, that Mr. C. S. Hutson was selling to the C. S. Hutson & Company an 18 per cent interest in the American Bank Check Company, for which he obtained credit on his open account of $10,100, and credit to a notes receivable, which the corporation held, of $7800?

A $7900.

Q $7900?

A That's right.

MR. POWELL: That's what the books reflect?

A Yes, that was all done through the resolution of the Board of Directors.

THE REFEREE: Who were the Board of Directors?

A. Mr. Hutson, Mr. Flynn, Mr. Sterling, Mr. Hoyt, and I am not sure whether Mr. H. L. Hutson was a director at that time.

BY MR. MYERS:

Q Now, would you refer back to that H. L. Hutson personal account, in which the item of $6,371.19 appears?

A Here it is. You want the C. S. Hutson account then, don't you?

(Testimony of Mr. Gosling)

MR. POWELL: This is a different book.

BY MR. MYERS:

Q You are now referring to the general ledger of C. S. Hutson & Company for 1929; is that right?

A That's right. Here is where he gave Mr. Hutson credit for that.

Q Credit for what amount?

A $6,371.19.

Q What did that credit—or rather where did that come from?

A That came from this American Bank Check Company deal.

Q Where did you get the credit?

A H. L. Hutson deal, rather, as of December 31, 1929, according to the books we owed H. L. Hutson $10,290.29.

Q That's what your books reflect that you owed Mr. H. L. Hutson?

A Yes.

Q And you used that credit of Mr. H. L. Hutson in what manner?

A Gave Mr. C. S. Hutson credit for $6,371.19.

Q Upon what account?

A His personal account.

THE REFEREE: Was he overdrawn, owed the company that much at that time?

A Well, let's see now. Yes, he was overdrawn at that time.

THE REFEREE: This $6300 was to clear that up?

A That $6300, plus the $10,000, that gave him a credit balance.

(Testimony of Mr. Gosling)

Q Let's see if I get you right. As you understand the transaction, after these deals had been made in your books, giving credit to C. S. on H. L. Hutson, the C. S. Hutson Company then owned by purchase, 18 per cent of the stock of the American Bank Check Company of San Francisco?

A The American Bank Check Company, yes, sir.

BY MR. MYERS:

Q And that's the company his father was running in San Francisco?

A Yes.

Q Now, do you know of your own knowledge whether or not during the year 1929, Mr. H. L. Hutson was working in the C. S. Hutson Company's plant in Los Angeles?

A No.

Q Was he working there?

A I don't think so. I wouldn't swear to it. At one time he was credit man there.

Q Was he ever working there during the time you were working there?

A No.

Q He was never employed there?

A He got a salary for doing work for C. S. Hutson & Company in San Francisco.

Q Did you credit him on the books his salary as an employee of C. S. Hutson & Company?

A Yes.

Q At what rate?

A Part of the time it was $400, and part of the time it was $200.

(Testimony of Mr. Gosling)

Q And the $10,000 credit to the H. L. Hutson account was a credit built up from salaries credited by the month?

A Do you mean after that?

Q No. What makes up that $10,000 figure of the H. L. Hutson Company?

A Well, that's back salary, plus other moneys. That was an old account.

Q How much was the back account?

A The old back account $6,711.79.

Q Do you know what makes up that account?

A Offhand I would say it was an old salary account. But I wouldn't swear to it.

Q And the difference between the $6700, which shows to the old account, up to the $10,000, was built up by salary credited by the month?

A That's right.

Q And then the salary account of H. L. Hutson was then wiped off of the books by crediting $3000 and some odd dollars to the American Bank Check Company, and the $6,371.19 credited to Mr. C. S. Hutson's personal account?

A That's right.

Q Now, will you take that journal and go down to April 30, 1930, and I think that's journal No. 233 in 1930.

A Page 233. Was that April or March?

Q April 30th.

A Here is April. What are you looking for, that Investment Account?

(Testimony of Mr. Gosling)

Q The $7000 amount.

A That's right, $7000.

Q Now, that entry shows in the journal, which is journal entry No. 2031, April 1930; calling your attention to an item of $7000, and will you tell me what that item represented?

A That's a charge of $7000 to the Investment Account; credit to C. S. Hutson of $7000, to record purchase from C. S. Hutson of additional seven per cent interest in the American Bank Check Company, making 25 per cent in all. See resolution of Board of Directors 2-5-30.

Q That, then, built up your Investment Account to $25,000?

A Yes.

Q And the credit in the Investment Account being a 25 per cent interest in the American Bank Check Company?

A Yes.

Q And the entire charge against that Investment Account was a credit to the C. S. Hutson account of $25,000, recording a sale of that amount?

A Yes, that's right.

Q And that credit was given to his own personal account?

A That's right.

Q Now, did you ever have any evidence or document or bill of sale or acknowledgment of any sort from the

(Testimony of Mr. Gosling)

American Bank Check Company, which ever came into your possession as the auditor of this company, showing that there was any ownership of 25 per cent in the American Bank Check Company?

MR. POWELL: I object to the phraseology of that. I have no objection to asking him if he had ever seen any certificate.

THE REFEREE: That might be so. Did you ever see any indication in writing of the ownership of C. S. Hutson & Company of any interest whatsoever in the American Bank Check Company of San Francisco?

A In the old books there were some entries whereby the C. S. Hutson & Company purchased equipment and other material, paper, I believe it was, for the American Bank Check Company. The amount I could not tell you, I believe it was $4000 or $5000.

Q Do you know whether that American Bank Check Company was a corporation?

A There was a particular thing there—

Q (Interrupting) Well, do you know whether it was a corporation?

A No, I don't.

Q So far as your answer now is, there is an entry on the books showing that the C. S. Hutson Company had advanced to the American Bank Check Company, of a certain amount of money. That's the only evidence of any entry you ever saw in that company?

A That's all I ever saw. One time I kept the books of the American Bank Check Company down there for a few months, but what became of them I don't know.

(Testimony of Mr. Gosling)

BY MR. MYERS:

Q Do you have an entry in that book which shows that the American Bank Check Company has a ledger account?

A I don't know, I don't remember, I don't believe there is any American Bank Check Company here. I don't locate it.

Q Do you know what year that American Bank Check Company was started?

A It was before my time. I could say it was about 1926 or 1927. There was a small book though that had all the stuff in it about it.

Q I am now calling your attention—will you take that original journal book that you have down there, and go to August 21, 1924. I think it should be your page No. 425.

A Here is page 425.

Q Calling your attention to the item of August 21, with respect to the $3500, read that.

A It's a charge to C. S. Hutson of $3500. Cash account, C. S. Hutson, $3500. Transfer as per instructions of C. S. Hutson.

Q Do you know what that $3500 represents?

A Well—

MR. POWELL (interrupting) Of his own knowledge.

BY MR. MYERS:

Q You were there at the time the entries were made?

A Yes.

Q You were there just prior to August 31, 1934?

A Oh, yes.

(Testimony of Mr. Gosling)

Q That being the time, or approximately the time the attachment had been on the plant for about a month?

A Yes.

Q Do you know of your own knowledge what disposition was made of the collections of C. S. Hutson & Company?

A Yes, the checks were cashed by Mr. Hutson, and he tooka a receipt for everything he spent. He usually gave me the receipts, and I added them up there as the cash received.

Q Do you have your cash book with you?

A That's in the cash book.

Q Which one of these books would it be?

A I don't see it here—it's a big long book. It's a book like this one (indicating).

Q Did you have a trustee's account?

A Here is the trustee's account.

Q I don't mean a trustee under bankruptcy. I mean did you carry a C. S. Hutson trustee account during the time the money he collected was under attachment?

MR. POWELL: Objected to as incompetent, irrelevant and immaterial.

BY MR. MYERS:

Q I will show you the ledger for 1934.

THE REFEREE: Objection overruled.

A Yes, here is the—there don't seem to be any here.

Q You remember when you showed me in these books this very item of $3500?

A That's what I am trying to find now. I don't find it.

Q Do you have any independent recollection as to what the $3500 represented?

A Yes, it was collections.

(Testimony of Mr. Gosling)

MR. POWELL: Objected to as the books are the best evidence. He has already testified—

A (Interrupting) Here is the item, I have found it.

BY MR. MYERS:

Q What are you referring to?

A To this journal entry, 2576.

Q And which journal reads transfer of cash to C. S. Hutson's personal account, as per his instructions, $3500?

A Yes, we charged his personal account with $3500.

Q Charged or credited?

A Charged his personal account.

THE REFEREE: What does that mean in the plain language of the street. He got $3500 of the money of C. S. Hutson & Company, and charged it on the books?

A He would take the money, and I had to charge it to him.

Q Am I to understand that Hutson, by some means or other, got hold of $3500 that belonged to the C. S. Hutson & Company and he kept that, and said, "Charge me on the books of the company with $3500"?

A That's right.

MR. POWELL: Just a minute, before making my objection I would like to have that answer stricken.

THE REFEREE: All right, it will be stricken for the objection.

MR. POWELL: Object to the question on the ground it asks for a conclusion of the witness. It says he took from the company moneys that belonged to the company.

THE REFEREE: I didn't say that, I said he assumed possession of money of $3500, and then told this gentleman to charge it on the books against C. S. Hutson. Objection overruled.

(Testimony of Mr. Gosling)

MR. POWELL: Exception.

THE REFEREE: Now, is that the understanding that you want me to draw, or that I should probably draw from your explanation here?

A Let me go a little further, your Honor. Mr. Hutson collected this money, and I charged his account, which I had to do; and then we credited his account with whatever he expended of the receipts. Here are the amounts, if he spent it we credited him. Pay roll and paper and ink, we had to pay in cash.

Q Was the place under attachment at that time?

A No, it was just before we went into the hands of the receiver.

BY MR. MYERS:

Q And this $3500 represents the balance of those funds which he was charged with and not accounted for?

A Yes.

Q He had had a good deal more money than that?

A Yes.

Q What did you call that account.

A One of them is the C. S. Hutson personal account, drawing account, and the other is the cash account of C. S. Hutton.

Q When did that account open?

A July 31, 1934, is the first entry here.

Q And you closed out the account as of what date?

A August 21, the entry is to trustee, $543.57.

Q To trustee $543.57?

THE REFEREE: Who was the trustee at that time?

A The books said Sinclair.

(Testimony of Mr. Gosling)

BY MR. MYERS:

Q When is the closing entry under the $3500?

A The last entry we have on the journal entries is August 20, 1934, and the cash account C. S. Hutson.

MR. MYERS: That's all, take the witness.

CROSS EXAMINATION

BY MR. POWELL:

Q Mr. Gosling, from the books that you have here, and the books you examined can you tell me, as of July 21, 1934, the status as to the books, that is, as to the last entry of Mr. Hutson's account with the company, that is, whether he has a credit with the company or a debit?

MR. MYERS: I *will glad* to hand you, Mr. Powell, a copy of the resume of the C. S. Hutson account beginning in 1926, showing all of the charges and credits to Mr. C. S. Hutson's account from that period on, and desire to file a copy of it.

MR. POWELL: I object to filing it. I am glad you handed them to me though.

THE REFEREE: All right, I won't look at it.

BY MR. POWELL:

Q As of March 1, 1934—

THE REFEREE (Interrupting): What I would like to know is just one single question, if I can have an answer to it. Does this company owe Hutson money, or does Hutson owe the company money?

MR. POWELL: That is the question I am asking now.

MR. MYERS: I am perfectly willing to stipulate that the books reflect, as of the close of business March 1,

(Testimony of Mr. Gosling)

1934, that the account of C. S. Hutson shows that the corporation was indebted to him in the sum of $7400.54. That is including the $25,000 credited to the account for the American Bank Check Company; including the $6371 charged or credited to the C. S. Hutson account from salary charged against his father, and including credits of $3500 of the trust money which he collected prior to the time the matter went into bankruptcy.

MR. POWELL: I will accept the stipulation, but I would like to withdraw from the stipulation the trust money. That's for the court to decide.

MR. MYERS: That's all right. It is the money he collected during the time of attachment on the plant, prior to the time the involuntary bankruptcy proceedings were had against him.

MR. POWELL: So that as far as the books show, Mr. Hutson has a credit on the books, the book account, of $7400.54?

MY MYERS: Yes.

THE REFEREE: And that C. S. Hutson also has a 25 *per interest* in the American Bank Check Company?

MR. POWELL: Yes.

THE REFEREE: And am I to take into consideration that H. L. Hutson testified in San Francisco that he had no interest in that business?

MR. POWELL: I think you are to close your mind on that.

THE REFEREE: I saw a certified copy of the proceedings.

MR. MYERS: Yes, sir, I know your Honor read it, and Mr. Powell has read it too.

MR. POWELL: That's all with this witness.

(Witness excused.)

THE REFEREE: This claim will be disallowed in toto.

MR. POWELL: Can I ask the court, disallowed on the evidence that has been rendered here today?

THE REFEREE: Yes.

MR. POWELL: I take exceptions.

* * * * * * * * *

MR. MYERS: We desire to introduce the general ledger for 1929; this is on the proceedings we had just previous to this, and also 1930, 1931, 1932, 1933 and 1934, and the journal entry with respect to the items which we questioned. It will not be necessary to introduce the other records, inasmuch as you are withdrawing your claim on that. And we also desire to introduce in evidence the transcript of H. L. Hutson's testimony in San Francisco under an order of special reference.

MR. POWELL: If this pertains to the proceedings already decided, we object to that as it has already been decided, and I have already noted my exceptions to the court's order.

THE REFEREE: Mr. Powell, as I said a while ago, I can't disabuse my mind of all the facts in this case. This deposition was taken up there, I think under an order made by me, and it is part of these proceedings, this whole bankruptcy proceedings. I don't see how I can wipe it from my mind. I am going to permit the filing of that.

MR. POWELL: If the court allows the reopening, could we have a formal introduction, so I can make my objection to it?

MR. MYERS: Do you want me to introduce them separately?

MR. POWELL: Yes.

MR. MYERS: I offer the general ledger of the C. S. Hutson Company for 1929, 1930, 1931, 1932, 1933 and 1934, and the journal of the C. S. Hutson & Company for the same period of time; that's in support of the opposition to the claim of C. S. Hutson for $7400.

MR. POWELL: Objected to as the books have already been examined, and on the further ground testimony has already been introduced concerning the contents of the books, to which no objection was made. I object to any other part or portions of the books.

THE REFEREE: I think it ought to be limited to those parts—

MR. MYERS (Interrupting): With respect to the C. S. Hutson and the H. L. Hutson accounts only.

MR. POWELL: I have no objection to it being considered that the books are introduced to corroborate Mr. Gosling's testimony, and inasmuch as Mr. Gosling read the entries themselves, I think it is unnecessary for the books to be introduced.

THE REFEREE: I think so too, Mr. Myers.

MR. MYERS: Only if there is an exception taken to this ruling, and a review goes up, then with respect to those particular matters which we talked about, which was the H. L. Hutson account, which shows the adding of the salary accounts during the time Mr. Gosling testified.

THE REFEREE: I will grant permission for them to be introduced in evidence, and overrule the objection, and you may have an exception.

MR. MYERS: I also desire to introduce in evidence a reporter's transcript of the testimony of H. L. Hutson, taken before Bertram W. Wyman, special master in bankruptcy, in the matter of C. S. Hutson, a bankrupt, No. 23748, at San Francisco, September 17, 1936.

MR. POWELL: Objected to as incompetent, irrelevant and immaterial; there has been no showing that this proceeding taken before the Special Master Wyman has any bearing on the present objection to the claim, and on the further ground that C. S. Hutson was not present at said hearing, nor was his counsel, and on the further ground that no notice of the hearing of the taking of the testimony was given to C. S. Hutson.

MR. MYERS: May we have a stipulation, Mr. Powell, that Mr. Hutson actually knew of the hearing and was actually present in San Francisco, but not in the hearing room?

MR. POWELL: I think that's immaterial.

THE REFEREE: Objection overruled and exception will be allowed. You may have an exception.

MR. POWELL: I will take my exception to that, and also my exception to the order of the court heretofore made.

THE REFEREE: That is all.

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, M. A. Clark, official reporter for the Hon. Hugh L. Dickson, Referee in Bankruptcy for the United States District Court, Central Division, Southern District of California, do hereby certify that the foregoing pages, 1 to 28, both inclusive, comprise a full, true and correct transcript of the testimony taken and proceedings had on the 12th day of April, 1937, in the matter of C. S. Hutson & Company, Bankrupt, in relation to a hearing on the objections of the Trustee to the Claim of C. S. Hutson.

Dated this 16th day of April, 1937.

M A Clark
Official Reporter

[Endorsed]: Filed Apr. 16, 1937 at 50 min. past 9 o'clock A. M. Hugh L. Dickson, Referee C. M. Commins, Clerk. Filed Apr. 20, 1937 at 3 min. past 4 o'clock P. M. R. S. Zimmerman Clerk M. J. Sommer, Deputy.

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

IT IS HEREBY STIPULATED by and between the Appellant and the Appellee, through their respective counsel, that the following original exhibits be certified by the Clerk of the United States District Court to the Clerk of the Circuit Co*ut* of Appeals for the Ninth Circuit, to-wit:

General Ledger entries for 1929, 1930, 1931, 1932, 1933 and 1934, and the Journal covering that period of time.

DATED this 13 day of April, 1938.

Robert B. Powell
Attorney for Appellant

Gerald Willis Myers
Attorney for Appellee

It is so ordered.

Geo. Cosgrave
Judge.

[Endorsed]: Filed April 13, 1938, 5 p. m. R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of	)	No. 23,748-C
	)	PETITION
C. S. HUTSON & COMPANY,	)	FOR APPEAL
	)	AND ORDER
Bankrupt.	)	ALLOWING
	)	APPEAL

TO THE HONORABLE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION:

C. S. HUTSON, feeling himself aggrieved by the final order of the above entitled Court in the above entitled proceedings made and entered herein on June 24, 1937, affirming the order of Hugh L. Dickson, Referee in Bankruptcy in the above entitled proceedings made on April 13, 1937, disallowing the claim of C. S. Hutson filed in the above entitled proceedings in the sum of $7400.54, does hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons and upon the grounds set forth in the Assignment of Errors filed herewith, and prays that an appeal may be allowed and a citation issued directed to S. J. Coffman, Trustee for the bankrupt estate of C. S. Hutson & Company, Bankrupt, commanding him to appear before said United States Circuit Court of Ap-

peals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings, and evidence of the above entitled proceedings, duly authenticated, may be transmitted to the said Circuit Court of Appeals for the Ninth Circuit, or for such other, further or different order and relief as may be meet in the premises.

Dated this 23rd day of July, 1937.

C. S. Hutson
C. S. HUTSON

Robert B. Powell
Attorney for C. S. Hutson

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed, and pursuant to the provisions of Section XXV of the Bankruptcy Act, IT IS ORDERED that the amount of the costs bond to be given on said appeal is hereby fixed at the sum of $250.00.

DATED: July 23, 1937.

Geo. Cosgrave
District Judge

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

C. S. HUTSON being by me first duly sworn, deposes and says that he is the Appellant in the above entitled action; that he has heard read the foregoing Petition for Appeal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

C. S. Hutson

Subscribed and sworn to before me this 23 day of July, 1937.

[Seal] C. M. Commins

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 7 min. past 1 o'clock Jul. 23, 1937 P. M. By R. B. Clifton, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now C. S. HUTSON, and in support of his appeal from the order of the above entitled Court in the above entitled proceedings made and entered therein on June 24, 1937, affirming the order of Hugh L. Dickson, Referee in Bankruptcy in the above entitled proceedings made on April 13, 1937, disallowing the claim of C. S. Hutson, filed in the proceedings in the sum of $7400.54, and sets forth that the said order of the District Court was erroneous by reason of the following:

1. The Court erred in disallowing the claim in the sum of $7400.54.

2. The Court erred in allowing evidence to be introduced in the form of a transcript of proceedings held in ancillary proceedings in San Francisco, said proceedings not having been brought on in the presence of C. S. Hutson or his counsel, and having been brought on and maintained with no notice having been given to the said C. S. Hutson.

3. The Court erred in considering facts which were not a part of the record of the proceedings.

4. The findings and order are contrary to the evidence.

5. The Court erred in disallowing objections made to the introduction of evidence.

6. The Court erred in not following the rules of evidence and allowing the introduction of inadmissable evidence.

WHEREFORE, the said C. S. Hutson prays that said order of the District Court of the United States of June 24, 1937, be reversed, and the lower Court be directed to enter an order allowing the said claim for the sum of $7400.54.

DATED: July 23, 1937.

C. S. Hutson
C. S. HUTSON

Robert B. Powell
Attorney for C. S. Hutson

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

C. S. HUTSON, being by me first duly sworn deposes and says that he is the Appellant in the above entitled action; that he has heard read the foregoing Assignment of Errors and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

C. S. Hutson

Subscribed and sworn to before me this 23 day of July, 1937

[Seal] C. M. Commins

Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed R. S. Zimmerman, Clerk at 7 min. past 1 o'clock Jul. 23, 1937 P. M. By R. B. Clifton Deputy Clerk.

[Title of District Court and Cause.]

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, C. S. HUTSON, as principal and MARYLAND CASUALTY COMPANY, as surety are held and firmly bound unto S. J. COFFMAN, as Trustee in Bankruptcy of the estate of the above named C. S. Hutson & Company, a corporation, in the sum of FIVE HUNDRED AND NO/100 --- ($500.00) --- DOLLARS, to be paid to him, or his successors, to which payment the undersigned surety binds itself, and its successors and assigns.

Signed and dated this 2nd day of August, 1937.

WHEREAS, in the above entitled proceedings on the 24th day of June, 1937, an order was made by the above entitled Court, affirming an Order made before Hugh L. Dickson, Referee in Bankruptcy, disallowing the general claim filed by C. S. Hutson for the sum of $7400.54, and said C. S. Hutson has appealed from said Order of the Court made on said 24th day of June, 1937, to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said C. S. Hutson in prosecuting such appeal to effect, shall pay all costs if

said C. S. Hutson shall fail to make the appeal good, then the above obligation shall be void; otherwise, to remain in full force and effect.

C. S. Hutson

[Seal] MARYLAND CASUALTY COMPANY

By N. C. Andrews,
Attorney-in-Fact

Examined and recommended for approval pursuant to Rule 28:

Hubert F. Laugharn
Attorney

The foregoing Bond is hereby approved this 2nd day of August, 1937.

Leon R. Yankwich
District Judge

The Premium Charged for
this Bond is $10.00

[Endorsed]: Filed R. S. Zimmerman, Clerk at 42 min. past 3 o'clock Aug. 2, 1937 P. M. By R. B. Clifton, Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION FOR CONTENTS OF RECORD

Appellant and Appellee, through their respective counsel, hereby stipulate that the Record in the above entitled matter shall contain the following documents:

1. The claim filed by C. S. Hutson
2. Objections to said claim filed by Trustee
3. Order on claim
4. Petition for Review
5. Referee's Certificate on Review
6. Order of District Judge
7. Petition for Rehearing
8. Order of District Judge
9. A Statement of Evidence
10. Stipulation concerning testimony taken of H. L. Hutson at ancillary proceedings in San Francisco
11. This Stipulation
12. Stipulation Re Exhibits

Dated this 13 day of April, 1938.

Gerald Willis Myers
Attorney for Trustee

Robert B. Powell
Attorney for C. S. Hutson.

[Endorsed]: Filed Apr 13, 1938 at 55 min. past 4 o'clock P. M. R. S. Zimmerman, Clerk, By M. J. Sommer, Deputy Clerk.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please print 40 copies of trans. of record on appeal.

Robert B. Powell
Atty. for C. S. Hutson, Appellant

[Endorsed]: Filed R. S. Zimmerman, Clerk at 55 min. past 4 o'clock Apr. 13, 1938 P. M. By M. J. Sommer Deputy Clerk.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 65 pages, numbered from 1 to 65, inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; claim filed by C. S. Hutson; notice of objection to allowance of claim; order disallowing claim; petition for review; referee's certificate on review; order of June 24, 1937; petition for rehearing; order of July 6, 1937; stipulation; statement of evidence; stipulation re exhibits; petition for appeal and order allowing appeal; assignment of errors; bond on appeal and stipulation for contents of record with praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to ..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this ..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8832.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
C. S. HUTSON & COMPANY,
Bankrupt.

C. S. HUTSON,
Appellant,

vs.

S. J. COFFMAN, Trustee in the matter of C. S. HUTSON & COMPANY, Bankrupt,
Appellee.

APPELLANT'S OPENING BRIEF.

ROBERT B. POWELL,
817 H. W. Hellman Bldg., Los Angeles, Cal.,
Attorney for Appellant.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 8832.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

C. S. HUTSON & COMPANY,

Bankrupt.

C. S. HUTSON,

Appellant,

vs.

S. J. COFFMAN, Trustee in the matter of C. S. HUTSON & COMPANY, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The District Court had jurisdiction over the subject matter herein involved by reason of the fact that a proof of unsecured debt was filed in the matter of C. S. Hutson & Company, Bankrupt [R. 4], and the Trustee for the bankrupt estate filed his objections to the said claim [R. 6], and the Referee made his order disallowing the claim [R. 7], and the Referee filed his certificate on review [R. 9; Bankruptcy Act, Section 2, Subdivision 10; 11 U. S. C. A., Section 11, Subdivision 10], and the District Court made its order denying petition for review

[R. 11], and made its order denying petition to reconsider [R. 13], and C. S. Hutson filed his petition for appeal [R. 57], and the order was granted allowing appeal. [R. 57.]

This Court has jurisdiction of this appeal, this being an appeal from a judgment allowing or rejecting a claim of five hundred dollars or over (Bankruptcy Act, Section 25), and this Court has jurisdiction (Bankruptcy Act, Section 24-B; 11 U. S. C. A., Section 47-B).

An appeal was allowed by the District Court on a petition for appeal on July 23, 1937.

Statement of the Case.

C. S. Hutson, the appellant herein, duly filed his proof of unsecured debt before the Referee in the sum of $7400.54 [R. 4], and S. J. Coffman, Trustee of the bankrupt estate, duly filed objections to the allowance of said claim, and a hearing was had before Hugh L. Dickson, Referee in Bankruptcy, on said proof of claim on April 12, 1937. [R. 7.] The Trustee's objections were based on three grounds, as follows:

> "1. That the records of said bankrupt are incorrect in that the true records of the bankrupt show that it is not indebted in any sum whatsoever but that you are indebted to the corporation in a sum in excess of $25,000.00.
>
> "2. That your purported claim arises out of fictitious sales of property and corresponding book entries therefor, wherein you attempted to sell to the bankrupt a one-fourth interest in the American Bank Check Company, receiving credit on *you* personal account for $25,000.00 although having no in-

terest in said company to sell and no evidence thereof ever delivered to the bankrupt.

"3. Fictitious entries of salary to H. L. Hutson since 1928, the credit thereof having been applied to your personal account."

The Referee made his order disallowing the claim of C. S. Hutson on April 13, 1937 [R. 7], and the Referee filed his certificate on review on April 16, 1937 [R. 9], and the Honorable George Cosgrave, District Judge, filed his order denying the petition for review on June 24, 1937. [R. 11.] C. S. Hutson filed a petition to reconsider the petition for review in the District Court [R. 12], and the District Court made its order denying said petition. [R. 13.]

The Trustee called a Mr. Goslin, who was the former auditor for the bankrupt corporation. He was the only witness who testified. The witness testified that on December 29, 1929, he found an entry in the sum of $6,371.19 which was credited to Mr. C. S. Hutson's personal account and charged against the salary of H. L. Hutson. [R. 34.] The witness testified that the journal entry gave Mr. Hutson a credit of $6,371.19, and a charge against H. L. Hutson of $10,290.29 [R. 36], and that H. L. Hutson was the father of C. S. Hutson. [R. 37.] There was no journal explanation of these items. [R. 37.] He testified as follows:

"There was some kind of a thing between the American Bank Check Company, who owed the company money, and Mr. H. L. Hutson, who he had on the pay roll. It was an old mixed up account, I couldn't tell you how many years it went back. He decided to wipe it out. In other words, he credited

his account and credited himself, and let it go at that.

By Mr. Myers:

Q. What was the balance of that $10,000 credit? A. Then we credited the American Bank Check Company for $3,919.10.

Q. And $6,371.19 to Mr. C. S. Hutson's personal account? A. Yes.

Q. Who owed the account of ten thousand two hundred some odd dollars, what was that against? Who had the credit for that amount of money? A. H. L. Hutson. That's my recollection of it.

Mr. Powell: That's what the books say, isn't it? A. Yes." [R. 37-38.]

The witness testified that on December 17, 1929, the American Bank Check Company sold to C. S. Hutson & Company an 18% interest in the American Bank Check Company for $18,000, and the $18,000 was charged to the investment account as a credit in the sum of $18,000, and represented an 18% interest in the American Bank Check Company, and the $18,000 was then credited to C. S. Hutson, there being a credit of $10,100 to the open account of C. S. Hutson, and $7,900 on his notes receivable account. [R. 40.] This transaction was approved by the board of directors of the company. [R. 40.] The witness testified that on December 31, 1929, H. L. Hutson had a credit with the company of $10,290.29, and that this amount plus the item of $10,000 gave him a credit balance on the books [R. 41]; that the credit of H. L. Hutson was a credit brought up from back salaries, plus other monies [R. 43], and that this back salary was removed from the books by crediting three thousand and some odd dollars to the American Bank Check Company, and $6,371.19 to C. S. Hutson's personal account. [R. 43.]

In April, 1930, there was a charge of $7,000 to the investment account of the company and a credit to C. S. Hutson for $7,000 to record purchase from C. S. Hutson of an additional 7% interest in the American Bank Check Company, making a 25% interest in all. This was approved by a resolution of the board of directors. [R. 44.] Mr. Goslin testified that on August 21, 1934, C. S. Hutson was charged with the sum of $3,500 [R. 47], and his personal account was charged with the sum of $3,500. [R. 48.] The Trustee, through his counsel, stipulated the the books of the corporation as of the close of business March 1, 1934, reflected that the corporation was indebted to C. S. Hutson in the sum of $7,400.54 [R. 51], and that the C. S. Hutson Company had a 25% interest in the American Bank Check Company. [R. 51.]

After the introduction of this evidence the witness was excused and the following took place:

> "The Referee: This claim will be disallowed in toto.
>
> Mr. Powell: Can I ask the court, disallowed on the evidence that has been rendered here today?
>
> The Referee: Yes.
>
> Mr. Powell: I take exceptions." [R. 52.]

Subsequently, the Trustee, through his counsel, made a motion to introduce the general ledger for 1929, 1930, 1931, 1932, 1933, and 1934, and the journal entry with respect to the items on which the witness was questioned. He also moved to introduce as evidence the transcript of H. L. Hutson's testimony in San Francisco under an order of special reference. [R. 52, 53, 54.] Objections were made to the introduction of the books on the ground that they had already been examined, and on the further

ground that testimony had already been introduced concerning the contents of the books. The books were allowed to be introduced and an exception allowed to C. S. Hutson. [R. 53, 54.] Then the following took place:

> "Mr. Myers: I also desire to introduce in evidence a reporter's transcript of the testimony of H. L. Hutson, taken before Bertram W. Wyman, special master in bankruptcy, in the matter of C. S. Hutson, a bankrupt, No. 23748, at San Francisco, September 17, 1936.
>
> Mr. Powell: Objected to as incompetent, irrelevant, and immaterial; there has been no showing that this proceeding taken before the Special Master Wyman has any bearing on the present objection to the claim, and on the further ground that C. S. Hutson was not present at said hearing, nor was his counsel, and on the further ground that no notice of the hearing of the taking of the testimony was given to C. S. Hutson.
>
> Mr. Myers: May we have a stipulation, Mr. Powell, that Mr. Hutson actually knew of the hearing and was actually present in San Francisco, but not in the hearing room?
>
> Mr. Powell: I think that's immaterial.
>
> The Referee: Objection overruled and exception will be allowed. You may have an exception.
>
> Mr. Powell: I will take my exception to that, and also my exception to the order of the court heretofore made.
>
> The Referee: That is all." [R. 54.]

Assignments of Error.

The assignments of error relied upon on this appeal are numbers 1, 2, 3, 4, 5, and 6. [R. 60, 61.]

ARGUMENT.

I.

The Referee and the District Court Erred in Allowing the Transcript of Proceedings Held in Ancillary Proceedings in San Francisco to Be Introduced in Evidence.

The argument under this heading is addressed to the following assignments of error:

2. The Court erred in allowing evidence to be introduced in the form of a transcript of proceedings held in ancillary proceedings in San Francisco, said proceedings not having been brought on in the presence of C. S. Hutson or his counsel, and having been brought on and maintained with no notice having been given to the said C. S. Hutson.

3. The Court erred in considering facts which were not a part of the record of the proceedings.

5. The Court erred in disallowing objections made to the introduction of evidence.

6. The Court erred in not following the rules of evidence and allowing the introduction of inadmissible evidence.

On October 20, 1936 the Trustee in bankruptcy filed his objections to the claim filed by C. S. Hutson. [R. 6.] Prior to this and on September 17, 1936, a hearing was had in ancillary proceedings before Bertram J. Wyman, as special master, in the matter of C. S. Hutson & Company, bankrupt. (The transcript is entitled, "In the Matter of C. S. Hutson," but this is obviously a typographical error. The transcript also reflects as follows:

"Messrs. John L. McNabb and S. C. Wright, attorneys for C. S. Hutson and American Bank Check Company." This also is obviously a typographical error and should be read as C. S. Hutson & Company.) There were no issues before the Court on the examination concerning the claim filed by C. S. Hutson, as no objections had been filed prior to that date by the Trustee. It was merely an examination of witnesses under Section 21-A of the Bankruptcy Act. It should be remembered that this testimony was not taken for use as a deposition, but merely as an examination to aid the Trustee. It should also be noticed that the transcript is unsigned by either the witness, the special master, or the reporter. The Referee decided this matter before the transcript was offered in evidence. Subsequently the case was reopened and the transcript offered in evidence over the objection of claimant. [R. 54.] After this decision and after the offer to introduce the transcript the following took place:

> "Mr. Powell: If this pertains to the proceedings already decided, we object to that as it has already been decided, and I have already noted my exceptions to the court's order.
>
> The Referee: Mr. Powell, as I said a while ago, I can't disabuse my mind of all the facts in this case. This deposition was taken up there, I think, under an order made by me, and it is part of these proceedings, this whole bankruptcy proceedings. I don't see how I can wipe it from my mind. I am going to permit the filing of that." [R. 52.]

Clearly this transcript was inadmissible, and should not have been considered by the Court.

Taylor v. Nichols, 134 App. Div. 787, 119 N. Y. Supp. 1042, 23 A. B. R. 310:

> "These schedules and part of the evidence so given by him in the bankruptcy proceeding were offered in evidence by the plaintiff upon the trial for the purpose of establishing the insolvency of the said Nichols at that time. To this offer the defendant objected, that as to him they were hearsay and that he was not bound by these declarations. The objections were overruled, the evidence was admitted, and the defendant excepted to the ruling. We are unable to see upon what ground this evidence was competent. It was the declaration of a bankrupt in a proceeding in which it does not appear that this defendant was a party. As to this defendant the evidence would seem clearly to be hearsay and inadmissible."

In the *Matter of National Boat & Engine Company,* 216 Fed. 208, it was held:

> "Upon a proceeding before the Referee for the distribution of the fund derived from the sale of the bankrupt's assets free from liens, testimony of the former president of the bankrupt company taken on a general examination under Section 21-A of the Bankruptcy Act and not directed to any definite issue is inadmissible in support of a claim."

Also see *Breckons v. Snyder,* 211 Pa. 176, 15 A. B. R. 112, 60 Atl. 575, in which it was held:

> "The notes of the testimony of the bankrupt, taken at a preliminary proceeding before the referee, to ascertain his assets and liabilities, were properly rejected. The issue was not between the same parties, nor did it involve the same subject matter."

Also see *In re Hersey,* 171 Fed. 1004, which holds that testimony taken at meetings of creditors, which the claimant did not attend and of which he received no notice, is not admissible upon the hearing of a claim.

II.

The Court Erred in Disallowing tht Claim in the Sum of $7400.54.

The argument under this heading is addressed to the following assignments of error:

1. The Court erred in disallowing the claim in the sum of $7,400.54.

It is contended by the Trustee that the record reflects that on August 21, 1934, the claimant collected the sum of $3,500.00 and applied it on the indebtedness due him from the bankrupt company. There is no evidence that on August 21, 1934, the company was insolvent or that the claimant knew or had reasonable cause to believe that the company was insolvent. Therefore, the Trustee cannot contend that a preference existed under the terms of Section 60, Subdivision B, of the Bankruptcy Act. This section provides as follows:

> "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four

months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The Trustee contends that a 25% interest in the American Bank Check Company was sold to the bankrupt by the claimant for the sum of $25,000.00, and that this last mentioned amount was credited on the books of the corporation, giving him a credit in the sum of $25,000.00. This 25% transaction took place on two different dates. On December 17, 1929, an 18% interest in the American Bank Check Company was sold to the bankrupt by the claimant [R. 40], and in April, 1930, a 7% interest was sold to the bankrupt by the claimant. [R. 44.] These two transactions were approved by the board of directors of the bankrupt. [R. 40, 44.] The bankruptcy proceedings were instituted more than three years after the last transfer of the 7% interest. There is no evidence in the record that any fraud was perpetrated on the creditors of

the bankrupt estate or that any creditors existed prior to the transfer of the 25% interest. Any rights that the bankrupt or its Trustee might have had have been destroyed by the Statute of Limitations. The applicable Statutes of Limitations are Sections 335 and 338:4, Code of Civil Procedure of the State of California, which provide as follows:

> Section 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"
>
> Section 338: "Within three years:
>
> "4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

These sections of the Civil Code of Procedure are cited although it is respectfully contended that there is no evidence whatsoever of any fraud even though the transcript of the proceedings taken in San Francisco is considered.

The Trustee contends that fictitious entries of salary to H. L. Hutson were made after 1928, and that this salary was credited to the personal account of C. S. Hutson. The only evidence concerning this is found in the transcript [R. 37, 38], in which it was stated by Mr. Goslin, the bookkeeper, that H. L. Hutson had a credit on the books of the corporation in the sum of ten thousand some odd dollars. Even if it can be considered that the

transcript taken in San Francisco throws any light on this situation any rights that the bankrupt or its trustee may have had are entirely destroyed by Section 335 and Section 338 of the Civil Code of Procedure of the State of California above quoted.

Conclusion.

The only evidence before this Court is that the books of the bankrupt reflect that the claimant, C. S. Hutson, has a claim against the corporation in the sum of $7,400.54. [R. 51.]

Appellant respectfully prays that the order appealed from be reversed and that the claim filed by C. S. Hutson be allowed in the sum of $7,400.54, and for such other relief as may be just and equitable.

Robert B. Powell,

Attorney for Appellant.

No. 8832.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

C. S. HUTSON & COMPANY,

Bankrupt.

C. S. HUTSON,

Appellant,

vs.

S. J. COFFMAN, Trustee in the Matter of C. S. Hutson & Company, Bankrupt,

Appellee.

APPELLEE'S REPLY BRIEF.

GERALD W. MYERS,
601 Ferguson Bldg., Los Angeles, Cal.,
Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles,.

TOPICAL INDEX.

INDEX TO APPENDIX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Text Books.

No. 8832.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

C. S. HUTSON & COMPANY,

Bankrupt.

C. S. HUTSON,

Appellant,

vs.

S. J. COFFMAN, Trustee in the Matter of C. S. Hutson & Company, Bankrupt,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Case.

S. J. Coffman, trustee in bankruptcy for C. S. Hutson & Company, being the Appellee herein and having received the Appellant's Opening Brief, desires to correct and more fully set forth a statement of the matters involved in this appeal.

On August 21, 1934, the C. S. Hutson Company being under attachment, a petition in involuntary bankruptcy was filed and thereafter proceedings were instituted by the

bankrupt company and C. S. Hutson to put the affairs of the C. S. Hutson Company under the provisions of the Bankruptcy Act known as 77-B, and that thereafter, on December 5, 1934, a proof of unsecured debt was filed in said 77-B proceedings on behalf of C. S. Hutson setting forth a purported claim in the sum of $7400.54 for services rendered [R. 4-5]. That subsequent thereto, in the year 1936, S. J. Coffman, having been appointed a trustee in bankruptcy and the 77-B proceedings having been terminated, petitioned and obtained an order authorizing the institution of ancillary proceedings in San Francisco, pursuant to which order of the District Court proceedings were had before Burton J. Wyman as special master, a copy of said proceedings being incorporated in full in the transcript of record, pages 17-30, inclusive, were filed before the referee in bankruptcy on December 7, 1936. That the trustee in bankruptcy, Appellee herein, filed a notice of objection to the allowance of the claim of C. S. Hutson [R. 6]. That after numerous continuances on behalf of Appellant, on April 12, 1937, a hearing on the objections to said claim came on before the referee, at which time Mr. C. S. Hutson was not present and the matter proceeded in his absence, however, he being represented by his attorney, Mr. Powell [R. 31]. That the transcript of proceedings at said hearing being very short, and the trustee and all parties concerned feeling that for a full and fair determination of the question the entire transcript be certified to your Honorable Court, it is set out in full on pages 31-54 inclusive of the transcript of rec-

ord. That at the termination of said hearing the referee disallowed the claim of C. S. Hutson in full [R. 7]. Thereafter a review was taken before the District Court which sustained the referee's ruling denying the claim [R. 11], a motion being thereafter made by C. S. Hutson to reconsider the ruling of the District Court, which was denied [R. 12-13]. The matter is now before your Honorable Court on review from all proceedings with respect to the disallowing of the claim of C. S. Hutson. With respect to the Appellant's statement of the case, the Appellee does not feel that the statements set forth by the Appellant are properly a statement of the case in that the matters set forth by Appellant are an endeavor to point out to the Court only those portions of the testimony which Appellant feels are favorable to him, and the Appellee respectfully urges that your Honorable Court read the entire transcript of proceedings set forth in the transcript of record. However, in order that the Court may have a summary of these proceedings with the pertinent parts thereof, Appellee will endeavor to do so.

The objections of the trustee to the claim were as follows:

1. That the records of said bankrupt are incorrect in that the true records of the bankrupt show that it is not indebted in any sum whatsoever, but that you are indebted to the corporation in a sum in excess of $25,000.00 [R. 6].

2. That your purported claim arises out of fictitious sales of property and corresponding book entries therefor,

wherein you attempted to sell to the bankrupt a one-fourth interest in the American Bank Check Company, receiving credit on your personal account for $25,000.00 although having no interest in said company to sell and no evidence thereof ever delivered to the bankrupt [R. 6].

3. Fictitious entries of salary of H. L. Hutson since 1928, the credit thereof having been applied to your personal account [R. 6].

The first witness called by Appellee was the auditor for the bankrupt corporation, who testified as follows: That he was employed by it from September, 1928 [R. 36], to August 21, 1934 [R. 50]. That H. L. Hutson was the father of C. S. Hutson, the Appellant herein [R. 37]. That H. L. Hutson was never employed by the C. S. Hutson Company working in Los Angeles during the period September, 1928, to August 21, 1934 [R. 42]. That on December 21, 1929, there was a credit upon the books of the bankrupt in the sum of $10,290.29 belonging to H. L. Hutson [R. 41], the only information I had about it was what C. S. Hutson told me [R. 37]. It being made up of salary credited to H. L. Hutson of salary at the rate of $400.00 per month part of the time and $200.00 thereafter up to December 31, 1929 [R. 41-43]. In December, 1929, the books show that the credit of $10,290.29 was applied as follows: $6,371.19 was charged to H. L. Hutson and credited to C. S. Hutson's personal account which was overdrawn [R. 37, 41] and the balance was credited to the account of the American Bank Check Company on our books and then the

H. L. Hutson account was in balance [R. 38, 41, 43]. That on December 17, 1929, the books reflect that C. S. Hutson personally sold to the C. S. Hutson Company an 18% interest in the American Bank Check Company for the sum of $18,000.00 [R. 39]. This $18,000.00 shows as an investment of the corporation in its investment account [R. 39] and the $18,000.00 [R. 39] credit was applied as a $10,000.00 credit to Mr. C. S. Hutson upon his personal overdrawn account and $7,900.00 was applied as a credit upon notes owed by him to the corporation [R. 40]. That the transaction appears to have been passed by the board of directors of which Mr. C. S. Hutson was a member, but the minute book could not be found [R. 40]. The American Bank Check Company was run by H. L. Hutson, the father of C. S. Hutson, in San Francisco [R. 42]. That thereafter, in April, 1930, an additional 7% interest in the American Bank Check Company was sold by C. S. Hutson to the C. S. Hutson Company for the sum of $7000.00, for which Mr. C. S. Hutson received credit upon his personal overdrawn account with said corporation and the books of the corporation showed an ownership of an additional 7% interest, making a total of a 25% interest in the American Bank Check Company, carried as an asset of said C. S. Hutson Company at $25,000.00 in its investment account [R. 44]. The only evidence of any ownership in the American Bank Check Company which I have ever seen was an old account in the C. S. Hutson Company books of around $4000.00 or $5000.00 advanced by the C. S.

Hutson Company to the American Bank Check Company which was paid. (See Exhibit A attached to this brief, same being copy ledger account shown in books of bankrupt introduced in evidence.) I also kept the books of the American Bank Check Company for a few months [R. 45]. The C. S. Hutson Company books also reflect that on August 21, 1934, there was a cash account in the sum of $3500.00 in the possession of C. S. Hutson personally [R. 46] which arose during the time an attachment was on the plant of the company [R. 47] and Mr. Hutson made all of the collections of accounts receivable of the company and paid bills and at the time the trustee under 77-B took possession of the plant there was a balance of $3500.00 in the account and Mr. C. S. Hutson told me to charge him on his personal account for $3500.00 and he kept the money, being accounts receivable collected by him personally [R. 48].

In addition to Mr. Gosling's testimony the trustee introduced in evidence the original books of account of the C. S. Hutson Company (which books are now certified by this Court) respecting the entries testified to, and also a transcript of testimony of H. L. Hutson taken in San Francisco on September 17, 1936, previously filed December 7, 1936 [R. 30].

The gist of the testimony at the hearing in San Francisco is as follows (let it here be specially noted that C. S. Hutson was represented by counsel [R. 17] and Appellant's explanation thereof as a typographical error is manifestly not proper, as will appear from the tran-

script itself [R. 17], and also let it be noted that C. S. Hutson was present in San Francisco at the time of the hearing but not personally in the court room, but was represented [R. 54]):

H. L. Hutson is the father of C. S. Hutson [R. 15]. That he moved to San Francisco in August, 1928, and ran and operated the American Bank Check Company [R. 18]. That since August, 1928, I have never drawn any salary from the C. S. Hutson Company [R. 19, 24]. I never knew that the C. S. Hutson Company owned a 25% interest in the American Bank Check Company and have never recognized such an interest [R. 20], and that I am the sole owner of the American Bank Check Company [R. 27], and that the C. S. Hutson Company does not owe me any money now or since I left in August, 1928 [R. 29].

In addition to this the general books of the company, particularly the investment account, filed herein, reflect that the C. S. Hutson Company carried as an asset the 25% interest in the American Bank Check Company from 1929 to August 21, 1934, in the sum of $25,000.00, and that in August, just prior to the trustee taking possession, this interest was reduced on the books of said company to a valuation of $1.00. (See "Exhibit B," note at end thereof, being copy of ledger account from books of bankrupt introduced in evidence.)

APPELLEE'S POINT ONE.

The Uncontradicted Testimony on the Hearing of the Trustee's Objection to the Claim of C. S. Hutson Clearly Disclosed That Fraud, Directly Traceable to the Claimant, Permeated the Entire Series of Transactions Upon Which the Claim Was Predicated, and This Being Apparent to the Referee, as Found by Him, It Became His Duty to Immediately Disallow the Entire Claim.

The facts in reference to the withholding by C. S. Hutson from the trustee of the sum of $3,500.00 in cash of the funds of the bankrupt have been hereinbefore summarized for the convenience and information of this Court and the trustee here desires to quote verbatim the remarks and questions propounded by the referee to the witness Gosling as shown on page 48 of the transcript of record [R. 48]:

> "The Referee: What does that mean in the plain language of the street? He got $3500 of the money of C. S. Hutson & Company, and charged it on the books?
>
> A. He would take the money, and I had to charge it to him.
>
> Q. Am I to understand that Hutson, by some means or other, got hold of $3500.00 that belonged to the C. S. Hutson & Company and he kept that, and said, 'Charge me on the books of the company with $3500'?
>
> A. That's right.
>
> Mr. Powell: Just a minute, before making my objection I would like to have that answer stricken.
>
> The Referee: All right, it will be stricken for the objection.

Mr. Powell: Object to the question on the ground it asks for a conclusion of the witness. It says he took from the company moneys that belonged to the company.

The Referee: I didn't say that, I said he assumed possession of money, of $3500, and then told this gentleman to charge it on the books against C. S. Hutson. Objection overruled."

Hereinbefore we have summarized also the evidence before the referee on the hearing of the objection to said claim in reference to strange and extraordinary entries upon the books of the bankrupt, of which the claimant was the president, respecting his personal dealings and transactions with the bankrupt corporation, including items of alleged salary to his father and the purported sale of either valueless or non-existing assets by which he obtained credits upon his personal overdrawn account of sums aggregating $31,371.19, in addition to the $3500 above referred to.

The rule having full and complete application under such circumstances was ably declared by the Court in a case similar in many aspects to the case here, and we now quote therefrom as follows:

"But the rule seems to be that where a creditor has interposed a claim, the larger portion of which is fraudulent, he is not entitled to any recovery, because the fraud permeates the entire account. Levy v. Hamilton, 68 App. Div. 277, 74 N. Y. Supp. 159; Byrnes v. Vols, 53 Minn. 110, 54 N. W. 942; Fairfield v. Baldwin, 12 Pick. (Mass.) 388."

In re Friedman, 164 Fed. 131-143.

We have hereinbefore directed attention to the fact that the transcript of the ancillary proceedings before the Special Master in San Francisco discloses upon its face that C. S. Hutson was personally represented, and we have also pointed out that the attempt of Appellant in his Opening Brief to contradict said record by a reference to an alleged typographical error, must fall of its own accord.

Appellants in error ignore the fact that even though the claimant had not been represented in the ancillary proceedings that it was nevertheless the duty of the referee under the circumstances disclosed by all of the evidence before him to have considered and examined the claim in the light of all of the facts and circumstances developed in the case and as to the credibility of the claimant reflected by his proof of claim only and after weighing and examining all testimony to have reached a conclusion allowing or denying the claim.

We now direct this Honorable Court's attention to an authority also based upon facts very similar in many aspects to those here, from which we now quote as follows:

> "The testimony of the claimant not having been directly contradicted, the referee apparently felt compelled to accept it as true, when he ought to have examined it in the light of all the facts and circumstances developed in the case, affecting the credibility of the claimant as a witness and the value of her testimony, and then have reached a conclusion, accepting or rejecting the same."
>
> *In re Ralph,* 293 Fed. 903, 905.

Appellee desires to direct the special attention of this Court to the fact that at the hearing of the objection to the claim of C. S. Hutson that he offered no evidence whatsoever upon his behalf nor did he even personally attend the hearing. The record discloses the following:

> "The Referee: In the matter of C. S. Hutson & Company, is Mr. Hutson here, Mr. Powell?
>
> Mr. Powell: No, I would like the record to show that I informed him this morning that we would go on with the matter at 2:00 o'clock, whether he was here or not.
>
> The Referee: All right."

At said hearing the referee considered, of course, the proof of unsecured debt that previously had been filed by C. S. Hutson on December 5, 1934, in the 77-B proceedings. We now ask this Honorable Court to inspect said proof of claim [R. 4-5] and to particularly note that said claim is not evidenced by any statement of account or any note, bond or memorandum and that the claimant has contented himself with simply describing his claim as being in the sum of $7400.54 for "services rendered," directly in violation of the National Bankruptcy Act and the General Orders in Bankruptcy.

The rule as to the obligation of a claimant in a bankruptcy proceeding has been well stated by the Federal Court as follows:

> "The referee is affirmed. Every creditor of a bankrupt estate must establish his claim by a preponderance of the evidence,—facts proved or admitted. This claim is not evidenced by any note, bond or memorandum and there are many circumstances which should put the trustee and referee on enquiry."
>
> *In re Wooten,* 118 Fed. 670.

Argument Answering Point I of Appellant.

In answer to argument of Point I of the Appellant which is captioned as follows: "The referee and the District Court erred in allowing the transcript of proceedings held in ancillary proceedings in San Francisco to be introduced in evidence."

The Appellant in attempting to present the argument upon this point refers to the assignment of error paragraphs 2, 3, 5 and 6 grouped in a single paragraph.

In order for this Court to obtain a full and complete picture of the matters presented by the Appellant in his argument of Point I, we feel that in answering this point there are certain matters which the Appellant has commingled in his statement of the case which properly should be brought to the Court's attention under Point I as follows: *"Claim of C. S. Hutson filed in 77-B proceedings* [*R. 4-5*], *this being a claim in the sum of $7400.54 for services rendered, of which $4126.88 is in the form of a note."* However, let it be brought to this Court's attention that no copy of the note is attached to this claim and no itemized statement of services rendered, and also that C. S. Hutson personally was not present, but represented by counsel *only* at the hearing on the objections to his claim.

In order for the trustee to present his objections to this claim it was necessary to analyze the complete account of C. S. Hutson as shown on the books of said corporation commencing in the year 1926 down to and including August 21, 1934, at which time the trustee in 77-B proceedings took over the property of the bankrupt. We are attaching hereto a summary of the personal account of C. S. Hutson with the corporation, as we feel that the

matters referred to in this summary present a clearer picture to the Court than for the Court to obtain the information by an audit of the corporation books.

In order for the Appellant to arrive at the amount of his claim of $7400.54 it was necessary to audit his account from the year 1926 to the date of the 77-B proceedings and allowing all of the credits and debits which are shown upon his personal account the books of the corporation reflected a balance of $7400.54 due and owing by the bankrupt corporation to the Appellant, which amount the trustee claimed was an error and fraudulent.

The trustee in his examination of the books and records of the bankrupt corporation questioned certain transactions shown upon the books by which the Appellant had obtained credits upon his personal account with the corporation which the trustee believed were fictitious entries and questioned particular items, to-wit: Journal entry #222 dated December 31, 1929, in which the Appellant received credits of $6371.19 upon his personal account which was charged to the account of H. L. Hutson; journal entry #223, $10,100.00 credit to his personal account and $7900.00 credited to his notes receivable account representing a sale by the Appellant to the bankrupt corporation of an 18% interest in the American Bank Check Company. In addition thereto journal entry #235 dated April 30, 1930, in the sum of $7000.00, representing the sale of an additional 7% interest in the American Bank Check Company for which the Appellant received credit on his personal account for said sum, and journal entry #425 dated August 21, 1934, in the sum of $3500.00 wherein C. S. Hutson at his own request kept $3500.00 belonging to the corporation of funds col-

lected for said corporation and charged his personal account with this amount on the date the trustee in 77-B took possession of the corporation.

These particular items were brought to the Court's attention *as if these items were improper* as maintained by the Appellee, the books of the bankrupt corporation would reflect that the corporation was not indebted to C. S. Hutton in the sum of $7400.54 or in any sum whatsoever, but rather that the Appellant herein was indebted to the bankrupt corporation in the sum of $27,470.65. However, at the hearing on the objection to the Appellant's claim it was not attempted in any manner whatsoever to obtain a judgment against the Appellant for any monies owing by him to the bankrupt corporation, but merely to disallow his claim in the sum of $7400.54 which he heretofore filed.

In this connection let it here be noted that on September 17, 1936, pursuant to orders regularly obtained, ancillary proceedings in the above matter were held before a special master in San Francisco and from the examination in San Francisco, it developed that the American Bank Check Company was being operated by one H. L. Hutson, who is the father of the Appellant, and that the father of the Appellant moved to San Francisco and took charge of the American Bank Check Company in August of 1928 [R. 18], and that the said H. L. Hutson has never drawn any salary from the C. S. Hutson Company since August, 1928, and has been owned and controlled exclusively by the American Bank Check Company, and that the total value of the American Bank Check Company during the years 1929, 1930 or 1931 would not exceed $20,000.00 to $25,000.00 [R. 20-21],

and that H. L. Hutson testified that the bankrupt company owed him no money and that it is not indebted to him in any sum whatsoever [R. 29].

The testimony of the hearing before the special master in San Francisco was filed December 7, 1936, before the referee in bankruptcy and refiled April 12, 1937 [R. 54], the date of the hearing of the objection to the Appellant's claim. It appears to the Appellee that the testimony of proceedings in San Francisco was properly admitted in evidence showing that the C. S. Hutson Company never received or owned an interest in the American Bank Check Company. That the sale by the Appellant to the bankrupt corporation of a 25% interest in the American Bank Check Company, for which he received credit in the sum of $25,000.00 upon his personal account which was overdrawn, was a fiction of Appellant's imagination in that he had no interest in the American Bank Check Company to sell, and further that the total value of the American Bank Check Company's assets at the time it was attempted to sell a 25% interest therein would not exceed $20,000.00 or $25,000.00, yet the Appellant sold, according to the books of the bankrupt corporation, a 25% interest therein and received from said bankrupt corporation credit upon his overdrawn personal account in the sum of $25,000.00.

Let it be here noted that on the general ledger of the bankrupt corporation up to and including the date that the trustee under 77-B was appointed the bankrupt corporation carried on its books as an asset in its investment account at a valuation of $25,000.00 the 25% interest in the American Bank Check Company and that in August of 1934 this interest was reduced upon the books of said corporation to the sum of $1.00.

Appellee herein contends, as it did during all of the hearings on the contest to the Appellant's claim, that in truth and in fact no sale of a 25% interest in the American Bank Check Company was ever sold to the C. S. Hutson Company and that the entire transaction was fraudulent in that it was an attempt on behalf of C. S. Hutson personally through his corporation, the C. S. Hutson Company, to perpetrate a fraud upon his books and to receive credit for $25,000.00 upon his personal overdrawn account for this amount, and the credit being improper should be removed and debited to his account.

At the same time this fictitious entry was made and on the same date the Appellant received as credit upon his personal overdrawn account, a further credit of $6371.19. The trustee in analyzing this transaction audited the account of H. L. Hutson, the father; a copy of this summary is also attached for convenience of the Court.

It will appear that the H. L. Hutson account opened in October, 1926, and the account for November shows a credit of $5948.02 for which no explanation is given, and the Appellee believes the only interpretation which can be placed upon it is that a loan or advance was made by H. L. Hutson to the company for this amount; during the year 1927 various credits and debits were made on this account including a credit of $735.00 as interest and salary at $300.00 per month; this salary was continued until the end of July, 1928. It will here be noted that this is the time H. L. Hutson left the employ of C. S.

Hutson Company in Los Angeles and moved to San Francisco to operate the American Bank Check Company.

From July, 1928, to September, 1929, no monthly credits of salary were made to this account, and then in September, 1929, by journal entry #212, appears a credit on the account of $4200.00 as salary beginning August, 1928, to September, 1929, at $400.00 per month, an increase of $100.00 per month after H. L. Hutson had left the corporation in Los Angeles and moved to San Francisco; this salary of $400.00 was then credited monthly thereafter until September, 1930, and then reduced to $200.00 per month for the months October, November and December, 1930, and from that time on no further credits appear on the account.

It will further appear that at the end of 1929 the books reflected that the corporation owed H. L. Hutson $10,290.29 and that this balance was used as follows: $6371.19 credited to C. S. Hutson personal overdrawn account and the balance credited to the American Bank Check Company.

In view of what the books of the corporation reflected, H. L. Hutson testified in the ancillary proceedings that since 1929 in August he had never drawn any salary from the C. S. Hutson Company. It would appear to Appellee that this complete transaction was a means used by C. S. Hutson to perpetrate a fraud upon his corporation by obtaining credits upon his books for money to which he was not entitled, thereby reducing his overdrawn account with his corporation to this extent.

The Appellee feels and desires to point out to this Court that the testimony of H. L. Hutson on ancillary proceedings was properly admitted before the referee and established by clear proof:

1. That no sale of a 25% interest in the American Bank Check Company could have been or was made.
2. That the C. S. Hutson Company does not now or ever has been the owner of any interest in the American Bank Check Company.
3. That after H. L. Hutson left the C. S. Hutson Company, salary credits were given to him on the books which in truth and in fact were used by C. S. Hutson to repay a personal overdrawn account of his on the books of the bankrupt corporation.

Appellee desires to here call attention to the cases cited by Appellant:

The cases cited by Appellant are all found in Remington on Bankruptcy, Volume 5, page 39, paragraph 2005, entitled "Admissibility of General Examination in Subsequent Litigation," and on page 423, paragraph 2260, entitled "Admissibility of Bankrupt's Schedules and General Examination Against Transferee." With the law of these cases Appellee does not differ, but their application to the present matter in controversy is not applicable.

Argument Answering Point II of Appellant.

In answering Point II of Appellant, he has confused three separate matters and in answering them let us separate the three matters:

(A) It is claimed by the Appellant that the transfer of the $3500.00 is not a preference under Section 60 of the Bankruptcy Act.

First let us look at the testimony of the witness Gosling. He testified that the $3500.00 arose during the time the C. S. Hutson Company was under attachment [R. 47] and on August 21st, 1934, the money was kept by C. S. Hutson as a charge on his account and a balance of $543.57 was delivered to the trustee in 77-B [R. 49].

How with any sincerity can the Appellant now claim that the present creditors were not creditors at the time of the $3500.00 transaction when that is the exact date of the inception of the above bankruptcy proceedings. Appellee feels it is a deliberate attempt to misrepresent this matter to this Honorable Court and is without a scintilla of proof to support it. We feel this disposes of the first point and that the question raised is of no value whatsoever. Attention is here called to the remarks of the referee on this transaction set forth on page 487 of the transcript [R. 48].

(B) Appellant's claim that any rights the Appellee had are now barred by Sections 335 and 338:4 of the Code of Civil Procedure of the State of California—we ask that the Court read subdivision 4 of Section 338 and con-

ceding for the purpose of argument only that this section applies, when did the period of limitation begin to run? Certainly not from the date of the transaction as claimed by the Appellant, but from the date of discovery, which could not have been at least until the examination of H. L. Hutson on September 17, 1936, and therefore by this section alone the period has not expired. In any event any point concerning the Statute of Limitations is raised for the first time on this appeal.

(C) With reference to the argument of Appellant that the entries of salary to H. L. Hutson respecting the running of the Statute of Limitations we feel the same argument to (B) applies, and what possible effect Appellant desires to accomplish by citing these sections Appellee cannot conceive, as one involves real property not an issue in this proceeding and no intimation of any real property in any of the testimony, and certainly the statute cannot run until a fraud is discovered, and the only date of discovery is the date of the very proceeding the Appellant is questioning.

Conclusion.

In conclusion the Appellee respectfully submits that it is apparent from the Opening Brief of the Appellant that either it is a deliberate attempt to misstate the facts involved in the matter for the purpose of misleading this Honorable Court or it is a hastily prepared document without proper consideration of either facts or law, due to lack of preparation or inexperience. And we feel that this is the only conclusion at which this Honorable Court can arrive.

The Appellee feels that it has shown to this Court from all the facts set forth herein,—and here we beg the pardon of this Honorable Court for the length of this brief, it, however, being caused by the confused manner in which the Appellant approached the issues involved, and the law applicable,—that the Appellee has shown ample grounds for the denial of the Appellant's claim, which was properly denied by the referee and the District Court, and that all the evidence introduced was proper and should have been admitted in evidence, and that the claim of C. S. Hutson in the sum of $7400.54 should be denied in total, and that this Court should sustain the rulings of the Referee in Bankruptcy and of the District Court in denying this claim.

Respectfully submitted,

GERALD W. MYERS,

Attorney for Appellee.

"EXHIBIT A"

ANALYSIS

C. S. HUTSON, PERSONAL-DRAWING A/C WITH C. S. HUTSON & COMPANY

Note: Charges made to this account consist of checks drawn by the C. S. Hutson & Co. in favor of C. S. Hutson, Mrs. C. S. Hutson, Pacific Capital; and in payment of personal insurance, interest, taxes, payments on stock purchases, and on notes due various ones. Also purchases made and charged to Company accounts.

1926		Dr.	Folio	
Oct. 31	Cash	250.00	Journal 21	
" 31	Misc/a/c (V. Journal missing)	780.00	" 22	
Nov. 30	" " " " " "	1,212.39	" 26	
Dec. 31	" " " " " "	165.00	" 31	
" 31	Cash	912.44	" 32	
	Total Debits			$ 3,319.83
		Cr.		
Oct. 31	Misc. a/c (V. Journal missing) (Pages 1-50)	$2,463.60	Journal 22	
Nov. 30	" " " " "	790.00	" 26	
Dec. 31	December Salary	750.00	" 31	
" 31	Int. 94.50-Entertainment) (383.50-expenditures) (made for C S H Co.)	478.00	" 33	
	Total Credits	$4,481.60		$ 4,481.60
	Credit Balance Dec. 31, 1926			$ 1,161.77

1927		Dr.	Folio	
Jan. 31	Cash	991.08	Journal	40
" 31	Purchases & Petty Cash	81.19	"	41-VJ 53
Feb. 28	Cash	949.44	"	44
" 28	Purchases & Petty Cash	411.00	"	45-VJ 69
Mar. 31	Cash	1,130.46	"	48
" 31	Purchases & Petty Cash	395.35	"	49-VJ 82
April 30	Cash	1,102.61	"	51
" 30	Purchases & Petty Cash	30.00	"	52-VJ 92
May 31	Cash	484.83	"	57
" 31	Purchases & Petty Cash	110.00	"	58
June 30	A/Rec. credited	166.50	"	60
" 30	Cash	2,097.16	"	66
" 30	Purchases	45.00	"	67
July 31	Cash	425.24	"	71
Aug. 30	Cash	30.00	"	75
" 31	Cash	674.62	"	77
Sept. 30	A/Pay/Credited	67.00	"	81
" 30	Interest	23.37	"	83
" 30	A/Pay credited	92.10	"	83
" 30	Charge	9.11	"	84
" 30	Cash	857.42	"	85
" 30	Cash	100.00	"	86
Oct. 30	Cash	822.68	"	92
" 31	Petty Cash & Purchases	60.00	"	93-VJ 114
Nov. 30	Cash	989.62	"	97
" 30	Purchases	8.75	"	98-VJ 117
Dec. 31	Cash	1,759.88	"	102
" 31	A/Rec. credited	33.48	"	101
" 31	Purchases & Petty Cash	201.87	"	103
	Omitted above			
Aug. 31	Cash—Citizens T. & S Bk.	200.13	"	77
" 31	A/Pay credited	40.00	"	78
	Total Debits			$14,389.89

C. S. HUTSON—Drawing a/c—Continued—Page 2.

1927		Cr.	Folio	
Jan. 31	Salary—January	750.00	Journal	41
Feb. 28	Cash credited	152.48	"	44
Feb. 28	Salary—February	750.00	"	45
Mar. 31	Cash credited	18.31	"	48
Mar. 31	Salary—March	750.00	"	49
Apr. 30	Salary—April	750.00	"	52
May 31	Salary—May	750.00	"	55
May 31	Charged Int—& S F Expenses	296.50	"	56
June 30	Charge thru Invoice Reg.	128.80	"	67—IR 104
" 30	Salary—June	750.00	"	65
July 31	Salary—July	750.00	"	70
Aug. 31	Salary—August	750.00	"	76
" 31	Charge Adjustment a/c	50.00	"	76
Sept. 30	Charge—to Harris & Frank a/c	50.00	"	82
" 30	Salary—September	750.00	"	84
" 30	Charge to A/Rec (CSH)	197.73	"	85
Oct. 31	Charge to A/Pay (CSH)	650.00	"	89
" 31	Salary—October	750.00	"	91
" 31	Prepaid Expense (a/c 135)	185.00	"	93
" 31	Prepaid Insurance (a/c 131)	94.50	"	96
Nov. 30	Salary—November	750.00	"	97
" 30	Charge A/Pay—Inv. Reg.	25.00	"	98—IR 118
Dec. 31	Salary—December	750.00	"	102
Dec. 31	Prepaid Expense (a/c 135)	120.00	"	103
	Total Credits			$10,968.32
	Debit Balance Dec. 31, 1927			$2,259.80

1928		Dr.	Folio	
Jan. 31	Cash	1,462.62	Journal	108
" 31	Purchases & Petty Cash	128.18	"	108
Feb. 28	A/Rec. credited	5.80	"	111
" 28	Purchases & Petty Cash	50.00	"	112
" 28	Cash	1,007.44	"	113
Mar. 31	Cash	1,189.41	"	116
" 31	Purchases	6.75	"	117
Apr. 30	Cash	2,501.14	"	120
" 30	Purchases	25.22	"	121
May 31	Credit Notes Rec (CSH)	1,871.64	"	124
May 31	Purchases	21.08	"	126
" 31	Cash	1,315.67	"	125
June 30	Cash (CD 169)	9,525.61	"	129
" 30	Purchases & Petty Cash	81.00	"	130
July 31	Credit A/Rec—Harry Stenge	147.25	"	133
" 31	Cash	1,221.83	"	134
" 31	Purchases & Petty Cash	35.15	"	135
Aug. 31	Cash	2,371.22	"	138
" 31	Credit A/Rec—Harry Stenge	14.50	"	139
" 31	Purchases & Petty Cash	35.75	"	139
Sept. 30	Cash	3,703.53	"	142
" 30	Purchases	5.00	"	144
Oct. 31	Cash	1,871.90	"	151
" 31	Purchases—dues etc	19.52	"	155
Nov. 30	Insurance	24.00	"	157
" 30	Cash	2,599.73	"	159
Dec. 31	Dues—Breakfast Club etc	221.15	"	167
" 31	Cash	869.73	"	168
" 31	Purchases	219.29	"	171
	Total Debits			$32,551.11

		Cr.	Folio	
Jan. 31	Salary—January	750.00	Journal	107
" 31	Malibu Lake a–c	45.80	"	111
Feb. 28	Salary—February	750.00	"	112
Mar. 31	Salary—March	750.00	"	115
" 31	Charge—Selling Expense	160.00	"	117
Apr. 30	Salary—April	750.00	"	119
" 30	Cash (CR 145)	1,871.64	"	120
May 31	Salary—May	750.00	"	123
June 30	Salary—June	750.00	"	128
" 30	Cash (CR 161)	7,680.00	"	129

C. S. HUTSON—Drawing a/c—Continued—Page 3

1928—Continued		Cr.	Folio		
June 30	Charge to Amer. Bk Ck Co.	52.70	Journal	130	
July 31	Salary—July	750.00	"	133	
" 31	Cash (CR 168)	1,000.00	"	134	
Aug. 31	Salary—August	750.00	"	137	
" 31	Charge to Amer. Bk Ck Co	6.80	"	137	
" 31	"	2.80	"	137	
Aug. 31	Selling Expense	100.00	"	139	
Sept. 30	Salary—September	750.00	"	143	
Oct. 31	Increase in Salary of $750. per mo. for 9 Mo. Jan. to Sept. incl. 1928	6,750.00	"	149	
" 31	Board of Directors, 10/30-28				
Oct. 31	Salary—October	1,500.00	"	149	
" 31	Wilshire-Commonwealth convertible note transferred to CSH Co.	21.00	"	149	
Nov. 30	Salary—November	1,500.00	"	157	
Dec. 31	Charge to Notes Pay—Don Lee Auto Contract	178.00	"	165	
" 31	Selling Expense—Amer Bk Ck	202.33	"	165	
" 31	Salary—December	1,500.00	"	167	
	Total Credits				$29,321.07
	Debit Balance Dec. 31, 1928				$5,489.84

1929		Dr.	Folio			
Jan. 31	Cash	24,372.52	Itemized	Ledger	a/c	
Feb. 28	Cash	2,223.28	"	"	"	
Mar. 31	" (CR 26)	1,500.00	"	"	"	
" 31	"	3,410.17	"	"	"	
Apr. 30	"	3,027.24	"	"	"	
May 31	"	2,916.71	"	"	"	
June 30	Transfer of Cadillac from CSH Co	4,678.50	" (J 202)	"	"	
June 30	Cash	2,407.52	"	"	"	
July 31	"	2,047.90	"	"	"	
Aug. 31	"	2,173.86	"	"	"	
Sept. 30	"	1,989.59	"	"	"	
Oct. 31	"	1,997.92	"	"	"	
Nov. 30	"	1,521.31	"	"	"	
Dec. 31	"	1,082.24	"	"	"	
	Total Debits					$55,348.76

		Cr.	Folio
Jan. 31	Salary—January	1,500.00	Ledger a/c
" 31	CSH—Personal Ck (evidently an exchange as check of same amount appears in January Charges (debits)	22,800.00	" "
" 31	Miscel—Western Wholesale	1.88	" "
Feb. 28	Salary—February	1,500.00	" "
" 28	Charge to CSH Co-portion of Xmas Gifts	129.15	" Journal 187
" 28	Cash (CR 18)	1,500.00	" a/c
Mar. 31	Salary—March	1,500.00	Journal 194
Apr. 30	Salary—April	1,500.00	" 197
May 31	Salary—May	1,500.00	" 199
June 30	Don Lee—correction—error	178.00	" 202
" 30	Salary—June	1,500.00	" 202
" 30	Cash—Clifford Baker (CR 61)	50.00	Ledger a/c
July 31	Salary—July	1,500.00	Journal 204
Aug. 31	Salary—August	1,500.00	" 207
Sept. 30	Salary—September	1,500.00	" 210
" 30	Depreciation on Buick & Cadillac—charged to CSH Co Surplus a/c	2,352.12	" 210

C. S. Hutson — Drawing a/c — Continued — Page 4

1929—Continued		Cr.	Folio	
Oct. 31	Salary—October	1,500.00	Journal	213
Nov. 30	Germains—cash (CR 94)	25.00	Ledger	a/c
" 30	Salary—November	1,500.00	Journal	217
Dec. 31	Salary—December	1,500.00	"	220
" 31	Charge made to H L Hutson Personal a/c	6,371.19	"	222
" 31	Charged to CSH Co. Investment a/c — partial payment of Sale by CSH to CSH Co. of 18% interest in Amer. Bank Check Co.	10,100.00	"	223
	To Complete sale of said 18% interest in Amer. Bk Check Co by CSH to CSH Co. $7,900. was credited to Notes Receivable—CSH. Resolution of Board of Directors, Dec. 27, 1929.			
	Total Credits			$61,507.34
	Credit Balance Dec. 31, 1929			$668.74

1930		Dr.	Folio	
Jan. 31	Cash	2,186.90	Ledger	a/c
Feb. 28	Cash	2,497.48	"	"
Mar. 31	Cash	2,634.61	"	"
Apr. 30	Cash	3,765.53	"	"
May 31	Cash	2,439.26	"	"
June 30	Cash	2,058.50	"	"
July 31	Cash	1,978.55	"	"
Aug. 31	Cash	1,125.22	"	"
Sept. 30	Cash	1,613.16	"	"
" 30	Pink Waronker	73.88	"	"
Oct. 31	Cash	1,521.07	"	"
Nov. 30	Cash	1,799.24	"	"
Dec. 31	Cash	1,204.74	"	"
	Total Debits			$24,898.14

		Cr.	Folio
Jan. 31	Salary—January	1,500.00	Journal 228
" 31	Goods ret'd W. Wholesale	7.50	Inv. Reg. 191
" 31	Cash a/c (CR 112)	11.38	
Feb. 28	Check cancelled	50.00	Journal 231
" 28	Miscel.	1.30	Inv. Reg. 194
" 28	Salary—February	1,500.00	Journal 231
Mar. 31	Salary—March	1,500.00	" 233
Apr. 30	Charged to CSH Co. Investment a/c to record purchase of additional 7% in Amer. Bank Check Co—making 25% in all—see Board of Directors Resolution February 5, 1930	7,000.00	" 235
Apr. 30	Salary—April	1,500.00	" 235
May 31	Salary—May	1,500.00	" 237
June 30	Cash (CR 153)	100.00	
" 30	Salary—June	1,500.00	" 240
July 31	Salary—July	1,500.00	" 242
Aug. 31	Salary—August	1,500.00	" 244
" 31	W A Reed	100.00	CR 161
" 31	Check Exchanged	100.00	CR 169
" 31	Traveling Expense SF etc	150.00	Journal 245
Sept. 30	Exchange CK $300—Reed, W A) 215.51)	515.51	CR 177
" 30	Salary—September	1,500.00	Journal 248
" 30	Traveling Expense 2 trips) to San Francisco)	350.00	" 248

C. S. Hutson — Drawing a/c — Continued — Page 5

1930—Continued		Cr.	Folio		
Oct. 31	Salary—October	1,250.00	Journal 250		
" 31	Pink Waronker—prev. charge) to CSH)	73.88	" 250		
Nov. 30	Salary—November	1,250.00	" 254		
Dec. 31	Salary—December	1,250.00	" 258		
" 31	Western W Drug Co	1.30	Inv. Reg. 214		
	Total Credits			$25,710.87	
	Credit Balance				$1,481.47

1931		Dr.	Folio
Jan. 31	Cash	2,031.67	Ledger a/c
Feb. 28	Cash	1,464.93	" "
Mar. 31	Cash	1,783.00	" "
Apr. 30	Cash	2,000.65	" "
May 31	Cash	1,315.33	" "
June 30	Cash	1,885.42	" "
July 31	Cash	1,834.82	" "
Aug. 31	Cash	1,197.84	" "
Sept. 30	Cash	1,793.50	" "
" 30	A/Rec—Uplifters Club	140.80	Journal 293
Oct. 31	Cash	1,872.28	Ledger a/c
Nov. 30	Cash	844.70	" "
Dec. 31	Cash	2,145.00	" "
	Total Debits	20,309.94	$20,309.94

		Cr.	Folio	
Jan. 31	Salary—January	1,250.00	Journal 261	
Feb. 28	Salary—February	1,250.00	" 262	
Mar. 31	Salary—March	1,250.00	" 267	
" 31	Charge to Fact Payroll	11.68	CD 157	
Apr. 30	Salary—April	1,250.00	Journal 269	
May 31	Salary—May	1,250.00	" 273	
June 30	Cks cancelled—Jenny	20.00	CD 169	
" 30	Salary—June	1,250.00	Journal 276	
July 31	Salary—July	1,250.00	" 280	
" 31	D W Wheeler	25.00	CD " 181	
Aug. 31	Salary—August	1,250.00	Journal 284	
Sept. 30	Salary—September	1,250.00	" 287	
Oct. 31	Salary—October	1,250.00	" 291	
" 31	A/Rec—Uplifter's Club	39.00	" 293	
" 31	" " "	92.47	" 293	
Nov. 30	Salary—November	1,250.00	" 294	
" 30	Hollywood Ath. Club dues) charged to Selling Exp)	36.00	" 294	
Dec. 31	Salary—December	1,250.00	" 298	
" 31	Studebaker Coupe sold to C S Hutson & Co by CSH.	1,242.74	" 299	
" 31	Charged to D W Wheeler	45.00	" 300	
	Total Credits			$16,511.89
	Debit Balance Dec. 31, 1931			$2,3

1932		Dr.	Folio	
Jan. 31	Cash	1,067.95	Ledger a/c	
Feb. 29	Cash	1,742.21	" "	
Mar. 31	Cash	947.98	" "	
April 30	Cash	1,817.45	" "	
May 31	Cash	994.30	" "	
June 30	Cash	1,635.00	" "	
July 31	Cash	296.27	" "	
Aug. 31	Cash	869.15	" "	
Sept. 30	Cash	1,489.63	" "	
Oct. 31	Cash	817.80	" "	
Nov. 30	Cash	770.00	" "	
Dec. 31	Cash	1,038.37	" "	
	Total Debits			$13,486.11

C. S. Hutson — Drawing a/c — Continued — Page 6

1932		Cr.	Folio		
Jan. 31	Salary—January	1,250.00	Journal	304	
" 31	Pd So. Calif. Tel. Co	18.75	"	304	
Feb. 29	Salary—February	1,250.00	"	307	
Mar. 31	Salary—March	1,250.00	"	309	
Apr. 30	April—Salary	1,250.00	"	313	
" 30	Hollywood Ath Club—dues	14.80	"	314	
" 30	Jonathan Club	12.90	"	314	
May 31	Salary—May	1,250.00	"	315	
June 30	Salary—June	1,250.00	"	317	
July 31	Salary—July	1,250.00	"	321	
Aug. 31	Salary—August	1,250.00	"	324	
Sept. 30	Salary—September	1,250.00	"	327	
" 30	Charge to A/Rec	5.50	CR	321	
Oct. 31	October—Salary	1,000.00	Journal	329	
Nov. 30	Isabel Hand	6.00	CR	329	
" 30	Salary—November	1,000.00	Journal	335	
Dec. 30	Salary—December	1,000.00	"	338	
	Total Credits				$14,307.95
	Debit Balance Dec. 31, 1932				$1,494.74

1933		Dr.	Folio	
Jan. 31	Cash	1,137.40	Ledger a/c	
Feb. 28	Cash	906.59	"	"
Mar. 31	Cash	587.46	"	"
Apr. 30	Cash	1,797.46	"	"
May 31	Cash	374.90	"	"
June 30	Cash	481.35	"	"
July 31	Cash	25.00	"	"
Aug. 31	Cash	319.07	"	"
Sept. 30	Cash (Trip to Washington) ($350.00 incl.)	564.88	"	"
Oct. 31	Cash (Trip—Washington)	200.00	"	"
Nov. 30	Cash " "	200.00	"	"
Dec. 31	Cash (Trip—Washington) ($100.00 incl)	753.88	"	"
	Total Debits			$7,347.99

		Cr.	Folio	
Jan. 31	Salary—January	1,000.00	Journal	346
Feb. 28	Salary—February	1,000.00	"	351
Mar. 31	Salary—March	1,000.00	"	352
Apr. 30	Salary—April	1,000.00	"	356
May 31	Salary—May	1,000.00	"	360
June 30	Salary—June	1,000.00	"	363
" 30	Ck Mrs. CSH—cancelled	125.00	Ledger a/c	
July 31	Cash Advanced	12.00	CD	293
" 31	Salary—July	1,000.00	Journal	369
Aug. 31	Salary—August	1,000.00	"	370
Sept. 30	Salary—September	1,000.00	"	375
Oct. 31	Salary—October	1,000.00	"	379
Nov. 30	Salary—November	1,000.00	"	381
Dec. 31	Salary—December	1,000.00	"	385
	Total Credits			$12,137.00
	Credit Balance Dec. 31, 1933			$3,294.7

C. S. Hutson—Drawing a/c—Continued—Page 7.

1934		Dr.	Folio		
Jan. 31	Cash	179.68	Ledger a/c		
Feb. 28	Cash	100.00	" "		
" 28	Note given to transfer from open a/c to Notes Payable. dated 2/1/1934 6 mo. 7%	5,089.59	Journal 400		
Aug. 21	Transfer of cash to CSH personal a/c—per his instructions	3,500.00	" 425		
	Total Debits			$8,869.27	
		Cr.	Folio		
Jan. 31	Salary—January	1,000.00	Journal 397		
Feb. 28	Salary—February	1,000.00	" 398		
" 28	Charged to Sales Expense Resolution of Board of Directors passed Oct. 1932 authorized $25. per week to CSH for expenses—during 1933 and Jan. 1934—CSH drew $425.00—balance due him	975.00	" 400		
Mar. 31	Salary—March	1,000.00	" 404		
Apr. 30	Salary—April	1,000.00	" 408		
May 31	Salary—May	1,000.00	" 413		
June 30	Salary—June	1,000.00	" 415		
July 31	Salary—July	1,000.00	" 421		
" 31	Sales Expense—Feb. 1 to July 31, 1934	170.00	" 422		
Aug. 15	Salary to Aug. 15"	500.00	" 425		
" 21	Salary to date	203.66	" 425		
	Total Credits			$8,848.66	
	Credit Balance August 21, 1934		(Open a/c)		$3,273.66
Feb. 1, 1934	due on Note given CSH By CSH Co.	5,089.59			
Mar. 1 to Aug. 11, 1934	drew against note as per ledger account	962.71			
	Balance due on Note				$4,126.88
	Claim Filed				$7,400.54

Analysis of this account has been made from the following records of the C. S. Hutson & Company:

Journal October 1926 to August 1934 inclusive
Ledgers " " " " " "
Notes Payable—February " " " "

Cash Receipts & Cash Disbursements missing from 1926 to 1930.

Cash & Purchases charged are taken as a monthly total—however can be readily verified as the items compiling said total are itemized on ledger account beginning January 1929, to 21, 1934.

SUMMARY

C. S. HUTSON PERSONAL—DRAWING A/C with C. S. HUTSON & COMPANY.

DEBITS consist of charges made through checks drawn by the C. S. Hutson & Co. and purchases made through the Company accounts.
CREDITS consist of salary, prepaid expenses and miscellaneous items as listed.
NOTE: An explanation is given below of any debit or credit extraordinary.

DEBITS					
	YEAR 1926			$ 3,319.83	
	" 1927			14,389.89	
	" 1928	Evidently Exchange Check—	$32,551.11 7,680.00	24,871.11	
	" 1929	Evidently Exchange Check—	$55,348.76 22,800.00	32,548.76	includes transfer of Cadillac from C. S. H. Co. to CSH. $4,678.50
	" 1930			24,898.14	
	" 1931			20,309.94	
	" 1932			13,486.11	
	" 1933			7,347.99	
	" 1934		8,869.27		
		Less Note	5,089.59	3,779.68	includes $3,500. transfer from CSH Co funds on date of Trusteeship.
	" 1934	Drew on above note		962.71	
Total				$145,914.16	
CREDITS					
	YEAR 1926			4,481.60	
	" 1927			10,968.32	
	" 1928	Evidently Exchange Check	29,321.07 7,680.00	21,641.07	includes salary increase of $750. per mo. Jan. 1, 1928 to Oct. 1, 1928, $6,750.00 (B of D)
	" 1929	Evidently Exchange Check	61,507.34 22,800.00	38,707.34	includes transfer from H. L. Hutson personal a/c $6,371.19 Partial Payment on Sale of 18% int. in Amer. Bk Ck Co. to CSH Co by CSH. (B of D) $10,100.00 Depreciation on Buick & Cadillac Autos $2,352.12
	" 1930			25,710.87	includes Sale of additional 7% int. in Amer. Bk Ck Co. to CSH Co by CSH (B of D) $7,000.00
	" 1931			16,511.89	Sale of Studebaker Coupe to CSH CO $1,242.74
	" 1932			14,307.95	
	" 1933			12,137.00	
	" 1934			8,848.66	includes Expense allowance of $25. per week—year 1933, Jan. 1934 less $425. which he had drawn. (B of D) $975.00
Total				$153,314.70	
Credit Balance—Amount—Claim filed					$7,400.54

"EXHIBIT B"

AMERICAN BANK CHECK COMPANY

ACCOUNT WITH

C. S. HUTSON & COMPANY.

1928	Dr.	Folio	
Mar. To H. W. Brintnall	$3,450.00	Journal	115
April Cash	704.50	"	120
" Purchases & Pay-outs	29.18	"	121
" Press & two Motors	448.00	"	119
" Wages paid	270.00	"	119
" " "	8.10	"	E-1534
May First paym't on Imps.	345.00	"	" 1531
" Addit'l " " "	105.00	"	" 1532
" Wages paid	203.90	"	" 1536
" Cash	352.25	"	125
" Purchases—expense etc	187.46	"	126
June " " —materials	123.16	"	" 1544
" Res. for Overhead	9.85	"	" 1544
" Wages	96.50	"	" 1547
" Cash	857.04	"	129
" C S Hutson	52.70	"	130
" Invoice Reg—Miscel	3.35	"	130
July Expense—Mark Twain Hotel	157.54	"	134
" Expense—Printing etc	13.99	"	134
" Cash (CSH) Petty cash items (100)	127.25	"	134
" Postal charges	1.43	"	135
Aug. Long Distance Phone—Cr CSH	6.80	"	137
" Administration Exp—CSH	200.00	"	138
" Telephone	2.43	"	139
Sept. Pontiac & cash ($5)	580.00	"	142
Nov. Telegrams	3.28	"	1647
Dec. Mark Twain	19.66	"	1652
" " "	113.37	"	1652
" " "	2.50	"	1652
" Cash	54.50	"	1668
" Charge	.72	"	1675
Total Debits			$8,529.46

	Cr.			
May By H. W. Brintnall	$3,450.00	"	1531	
June Cash	25.00	"	129	
July Charge to Wheeler—Sales	64.17	"	135	
Dec. A/Rec	.72	"	173	
Total Credits				3,539.89
Debit Balance Dec. 31, 1938				$4,989.57

This account, as above balance, transferred from Gen'l Ledger to Accounts Receivable.

Various charges and credits made to this account as shown on Accts Receivable Ledger cannot be analyzed as all records are not available. However these are the "high lights"—

A credit given as of Dec. 1929 for $3,919.10 and charged to H. L. Hutson, Journal 222.

A credit given as of Mar. 30, 1929 for $3,516.57 and charged to CSH & Co—Surplus a/c

Explanation of this entry as follows: to clear as of Dec. 31, 1928, this amount as it has been decided and authorized by C S. Hutson, that these expenses properly belong to C S Hutson & Co. Journal—193.

This account now stands on the CSH Co books as an account payable with a balance due them of $46.41—which has not been filed with the Referee in Bankruptcy.

Note:

A 25% interest in this Company was sold by C S Hutson to C S Hutson Co as follows:

Charged to Investment A/C	$18,000.	Credited to CSHutson, Personal a/c	$10,100.
Dec. 31, 1929—Journal 223.		" " " CSH—Notes Receivable	7,900.
Apr. 30, 1930— " 235.			
			$18,000.
Charged to Investment A/C	7,000	" " " CSH Personal a/c	7,000.
	$25,000.		$25,000.

Dec. 31, 1933—This stock was reduced to the value of $1.00—Journal 393.
Notation—To write down and close out certain stocks.

Resolution of the Board of Directors for the purchase of this stock as per Journal entry—but no record of their passing on the reduction of the value of said stock.

"EXHIBIT C"

ANALYSIS OF H. L. HUTSON ACCOUNT
with
C. S. HUTSON & COMPANY

1926		Dr.	Folio			
Oct. 31	Miscel. a/c	334.40	Journal	22	—Pages in Voucher Journal 1 to 50	
Dec. 31	Cash—personal	25.00	"	32	missing.	
" 31	" "	225.00	"	32		
						$584.40
	Total Debits					
		Cr.				
Oct. 31		796.50	"	22	"	" "
Nov. 30		5,948.02	"	26	"	" "
Dec. 31	Dec. Salary	300.00	"	31		
	Total Credits					$7,044.52
	Dec. 31, 1926		Credit Balance			$6,460.12

1927				
Jan.	Cash	225.00	Journal	40
"	Purchases—V Journal 55.	68.10	"	41
Feb.	Cash	200.00	"	44
Mar.	"	225.00	"	48
"	Purchases—V Journal 82	25.00	"	49
Apr.	Cash	250.00	"	51
May	"	225.00	"	57
"	Cr. to A/Pay	160.00	"	56
June	Cash	100.00	"	66
July	"	100.00	"	71
Aug.	"	174.68	"	77
Sept.	Cr. A/Pay—A. K. Henry	150.00	"	83
"	Cash	300.00	"	85
Oct.	"	275.00	"	92
Nov.	"	300.00	"	97
"	A/Rec.—Cr. So. Calif. Music	11.16	"	96
Dec.	Cash	325.00	"	102
	Total Debits	3,113.94		$3,113.94

		Cr.		
Jan.	Salary	300.00	"	41
Feb.	"	300.00	"	45
Mar.	"	300.00	"	49
Apr.	"	300.00	"	52
May	"	300.00	"	55
June	"	300.00	"	65
July	"	300.00	"	70
Aug.	"	300.00	"	76
Sept.	"	300.00	"	84
Oct.	"	300.00	"	91
"	Interest (?)	735.00	"	90
Nov.	Salary	300.00	"	97
Dec.	"	300.00	"	102
"	Prepaid Expense	100.00	"	103
	Total Credits			$4,435.00
	Increase—Credit Dec. 31, 1927			$1,321.06
	Credit Balance—Dec. 31, 1927.			$7,781.18

H. L. HUTSON—Continued—Page 2.

				Dec. 31, 1927 –Cr. Balance	$7,781.18
1928		Dr.	Folio		
Jan.	Cash	300.00	Journal	108	
Feb.	"	250.00	"	113	
Mar.	"	225.00	"	116	
"	Purchase	8.48	"	117	
Apr.	Cash	650.00	"	120	
May	"	335.00	"	125	
June	"	275.00	"	129	
July	"	300.00	"	134	
"	Purchase	5.25	"	135	
Aug.	Cash	325.00	"	138	
"	Purchase	5.00	"	139	
Oct.	Cash	124.50	"	151	
"	Insurance paid	94.16	"	155	
Nov.	Cash—Auto	123.50	"	159	
Dec.	Cash & Auto	148.50	"	168	
	Total Debits				$3,169.39
		Cr.			
Jan.	Salary	300.00	"	107	
Feb.	"	300.00	"	112	
Mar.	"	300.00	"	115	
Apr.	"	300.00	"	119	
May	"	300.00	"	123	
June	"	300.00	"	128	
July	"	300.00	"	133	
	Total Credits				2,100.00
	Increase Debits—Dec. 31, 1928				1,069.39
	Credit Balance, Dec. 31, 1928				$6,711.79

1929		Dr.		
Jan.	Cash	163.50	Ledger Sht—Cash Records, 1928-29-30 missing.	
Feb.	"	163.50	" "	
Mar.	"	173.50	" "	
Apr.	"	163.50	" "	
May	"	163.50	" "	
June	"	173.50	" "	
July	"	163.50	" "	
Aug.	"	363.50	" "	
Sept.	"	163.50	" "	
Oct.	"	40.00	" "	
Nov.	"	50.00	" "	
Dec.	"	40.00	" "	
	Total Debits			$1,821.50
		Cr.		
Sept.	Salary—to set up Salary Aug. 1928 to Sept. 1929—14 months @ $300. per	4,200.00	Journal 212 (?)	
Oct.	Salary	400.00	" 213	
Nov.	"	400.00	" 217	
Dec.	"	400.00	" 220	
	Total Credits			5,400.00
	Increase Credits—Dec. 31, 1929			3,578.50
	Credit Balance, Dec. 31. 1929.			$10,290.29

Above Credit Balance charged off as follows:

Dr. H L H. $10,290.29

Cr. American Bank Check Co in A/Rec 3,919.10

" C S Hutson—Personal a/c 6,371.19 (?)

Journal 222. =====

H. L. HUTSON—Continued—Page 3.

1930		Dr.	Folio	
Jan.	Cash	44.50	Ledger Sht.	
Feb.	"	50.00	" "	
Mar.	"	40.00	" "	
Apr.	"	40.00	" "	
May	"	50.00	" "	
June	"	40.00	" "	
July	"	40.00	" "	
Aug.	"	20.00	" "	
Sept.	"	174.00	" "	
Oct.	"	40.00	" "	
Nov.	"	50.00	" "	
Dec.	"	40.00	" "	
	Total Debits			628.50

		Cr.		
Jan.	Salary	400.00	Journal 228	
Feb.	"	400.00	" 231	
Mar.	"	400.00	" 233	
Apr.	"	400.00	" 235	
May	"	400.00	" 237	
June	"	400.00	" 240	
July	"	400.00	" 242	
Aug.	"	400.00	" 244	
Sept.	"	400.00	" 248	
"	Exp. Ck to Tucker	104.00	CR 177—missing	
Oct.	Salary	200.00	Journal 250	
Nov.	"	200.00	" 254	
	Total Credits			4,104.00
	Credit Balance—Dec. 31. 1930			$3,475.50

1931		Dr.		
Jan.	Cash	50.00	C D 146	
Feb.	"	40.00	" " 152	
Mar.	"	30.00	" " 157	(Cash drawn 1931—
Apr.	"	10.00	" " 158	Checks of $10. each
May	"	50.00	" " 168	week to Mrs. H. L. Hutson)
June	"	40.00	" " 174	
July	"	50.00	" " 181	
Aug.	"	40.00	" " 185	
Sept.	"	40.00	" " 191	
Oct.	"	50.00	" " 198	
Nov.	"	40.00	" " 204	
Dec.	"	40.00	" " 209	
	Total Debits	480.00		480.00
	Credit Balance—Dec. 31, 1931			$2,995.50

1932		Dr.		
Jan.	Cash	50.00	C D 214	
Feb.	"	40.00	" " 219	
Mar.	"	40.00	" " 223	
Apr.	"	50.00	" " 228	
May	"	40.00	" " 233	
June	"	50.00	" " 237	
	Total Debits			270.00
	Credit Balance—Dec. 31, 1932.			$2,725.50

1933

Jan. Note dated Jan. 4, 1933 given for above credit balance, thus transferring open account to Notes Payable. Journal 349.

1934		Dr.	Cr.	
Feb.	Note given in payment of interest	654.58	654.58	To set up interest on note Journal 400 & adjust interest before note was issued.

H. L. HUTSON—Continued—Page 4.

Due H L Hutson—Notes Payable—note	$2,725.50
" " "	654.58
Total	$3,380.08

This is included in Notes Payable, C S Hutson Co—per trustee's records as of Aug. 21, 1934 and at present date, July 23, 1936.

No. 8815

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANCES HILL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FRANCES HILL,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Bill of Exceptions (Continued) PAGE

Testimony on Behalf of Plaintiff (Continued)

Bill of Exceptions (Continued) PAGE

Testimony on Behalf of Plaintiff (Continued)

PAGE

Names and Addresses of Attorneys.

For Appellant:

BEN HARRISON, Esq.,
United States Attorney.

ERNEST D. FOOKS, Esq.,
Department of Justice,

610 South Main Street,
Los Angeles, California.

For Appellee:

ALVIN GERLACK, Esq.,

845 Mills Building,
San Francisco, California.

UNITED STATES OF AMERICA, SS:

To Frances Hill Plaintiff and Alvin Gerlack, *his* attorney,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 16th day of April, A. D. 1937, pursuant to Order Allowing Appeal filed March 16, 1937 in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled Frances Hill vs. United States of America, No. 6155-H wherein the United States of America is defendant and appellant and you are plaintiff and appellee to show cause, if any there be, why the judgment in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HARRY A. HOLLZER United States District Judge for the Southern District of California, this 16th day of March, A. D. 1937, and of the Independence of the United States, the one hundred and sixty-first

H. A. Hollzer

U. S. District Judge for the Southern District of California.

Receipt is hereby acknowledged of a copy of this citation and copies of the Petition for Appeal, Order Allowing Appeal, Assignments of Error, Order Extending Time within which to Serve & File Bill of Exceptions and Extending Term, & Order Extending Time to Docket Cause on Appeal, this 16th day of March, 1937.

Alvin Gerlack
ALVIN GERLACK,
Attorney for Plaintiff.

[Endorsed]: Filed Mar 16 1937 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FRANCES HILL	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. 6155-H
	)	
UNITED STATES OF AMERICA;	)	
	)	
Defendant.	)	

COMPLAINT-WAR RISK INSURANCE

Plaintiff complains of the defendant and alleges:

I.

That plaintiff is a citizen of the United States and a resident of the Southern District and State of California, and of the County of Los Angeles therein.

II

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924 and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III

That on or about the 28th day of March, 1918, plaintiff entered the armed forces of the defendant; that she served the defendant as a Nurse in its Army from the said March 28th, 1918, to on or about February 3, 1919, when she was honorably discharged from said service and that dur-

ing all of said time she was employed in active service of defendant.

IV.

That immediately after entering the defendant's said service plaintiff made application for and was granted insurance in the sum of $10,000. by the defendant, who thereafter issued to plaintiff *it's* certificate No. T of *his* compliance with said acts, so as to entitle *him* and *his* beneficiaries to the benefits of said acts, and the rules and the regulations of said bureaus and the directors thereof, and that during the term of her said service the defendant deducted from *his* pay for such service, the monthly premiums provided for by said acts and the rules and regulations promulgated by the defendant. That plaintiff paid all premiums promptly when the same became due on said policy until June 30, 1919.

V.

That while serving the defendant as aforesaid, the plaintiff contracted certain diseases, injuries and disabilities resulting in and known as pulmonary trouble, heart trouble and other disabilities as shown by the records and files of the United States Veterans Administration.

VI

That said diseases, injuries and disabilities have continuously since February 3rd, 1919, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases, injuries and disabilities are of such nature and founded upon such conditions that it is reasonably certain they will continue throughout plaintiff's lifetime in approximately the same degree. That plaintiff has been, ever since February 3rd, 1919, and still now is, permanently and totally disabled by

reason of, and as a direct and proximate result of such disabilities above set forth.

VII

That plaintiff on June 18th, 1931, made application to the defendant, through its Veterans Bureau and the Director thereof, for the payment of said insurance for permanent and total disability, and that said Veterans Bureau, and the Director thereof have refused to pay plaintiff said insurance and on Dec. 16, 1932 disputed plaintiff's claim to said insurance and disagreed with her concerning her rights to the same.

VIII

That under the provisions of the said acts and other acts amendatory thereof, plaintiff is entitled to the payment of fifty-seven and 50/100 Dollars ($57.50) for each and every month transpiring since February 3rd, 1919, and continuously thereafter so long as she lives and continues to be permanently and totally disabled.

IX

That plaintiff has employed the services of Alvin Gerlack, an attorney and counsellor at law, duly licensed and admitted to practice before this court and all courts of the State of California. That a reasonable attorney's fee to be allowed to plaintiff's attorney for his services in this action is ten per centum (10%) of the amount of insurance sued upon and involved in this action, payable at a rate not exceeding one-tenth of each of such payments until paid in the manner provided by Section 500 of the World War Veterans Act of 1924 as amended.

As and for a second, and separate cause of action, plaintiff alleges:

I.

Plaintiff adopts and reincorporates in this her Second Cause of Action, Paragraphs I, II, III, IV, V, VII and IX of *his* First Cause of Action, and makes them a part hereof, the same as if expressly set out in full herein.

II

That at the time plaintiff ceased to pay said premiums due on said insurance, she was suffering from a compensable disability, to wit multiple selerosis, of ten per centum (10%) disability resulting directly from injury and disease contracted in line of duty while in active service of the defendant, United States of America: that in pursuance of the provisions of the War Risk Insurance Act and the World War Veterans' Act of June 7, 1924, as amended, plaintiff was given various compensation ratings by the defendant's Bureau of War Risk Insurance, and also its Veterans' Bureau, namely of a compensable degree of disability of ten per centum (10%) or more from Feb. 3, 1919 to the present time, all of which ratings are for a compensable degree of disability. That although entitled to compensation from the defendant's Veterans' Bureau on account of said ratings made by it, plaintiff drew no compensation from the defendant's Veterans' Bureau for any disability prior to April 1, 1920.

That by reason of non-payment of premium due on her said insurance as aforesaid, the defendant claims that said insurance lapsed on Feb. 3, 1919. That at all times from and after the 3rd day of Feb. 1919, up to and including April 1, 1920 through the application of compensation to which she was entitled under her disability ratings as

aforesaid, and Section 302 of the War Risk Insurance Act as amended December 24, 1919 and which was then uncollected, plaintiff's said insurance was revivable and revived in the sum of Ten Thousand Dollars ($10,000.00) as directed by said Statutes, including Section 305 of the World War Veterans' Act of June 7, 1924 as amended, and became payable to her in monthly installments of Fifty Seven and 50/100 Dollars ($57.50) per month, as of and from the date of the beginning of her permanent and total disability during the remainder of her life and in case of her death after the beginning of her permanent and total disability, thereafter to her beneficiary until the total of two hundred and forty (240) installments have been paid, less the unpaid premiums and interest thereon at five per centum (5%) per annum compounded annually in installments as provided by law.

III.

That ever since said Feb. 3, 1919, and at all times since that date, there has been due to plaintiff, said sum of Fifty Seven and 50/100 Dollars ($57.50) for each and every month transparing since said date, less unpaid premiums and interest thereon at five per centum (5%) per annum compounded annually in installments as provided by law, and that there will be due in the future like monthly installments in a like amount so long as plaintiff continues to live and remains permanently and totally disabled. That the defendant, United States of America has wrongfully and unlawfully refused to pay the plaintiff any of said monthly installments of Fifty Seven and 50/100 Dollars ($57.50) per month due plaintiff, since Feb. 3rd, 1919.

WHEREFORE, PLAINTIFF prays judgment as follows:

First: That plaintiff since Feb. 3rd, 1919, has been and still is, permanently and totally disabled.

Second: That plaintiff have judgment against the defendant for all of the monthly installments of $57.50 per month for each and every month from the said Feb. 3rd, 1919, and continuously, so long as she lives and remains permanently and totally disabled.

Third: Determining and allowing to plaintiff's attorney a reasonable attorney's fee in the amount of ten per centum (10%) of the amount of insurance recovered in this action, payable at a rate not exceeding one-tenth (1/10th) of each of such payments until paid in the manner provided by Section 500 of the World War Veterans' Act of 1924 as amended, and such other and further relief as may be just and equitable in the premises.

Fourth: That plaintiff have judgment against the defendant for all of the monthly installments of said insurance in the amount of $57.50 per month for each and every month beginning with the date upon which she is found to be permanently and totally disabled, to-wit at any time between Feb. 3rd, 1919, and April 1, 1920, during all of which time she had uncollected compensation due *him* from the United States Veterans' Bureau, sufficient to have paid all premiums due on said insurance, less the unpaid premiums and interest thereon at five per centum (5%) per annum. compounded annually in installments as provided by law, and continuously thereafter, so long as plaintiff continues to live and remains permanently and totally disabled.

Alvin Gerlack
Attorney for Plaintiff

UNITED STATES OF AMERICA)
Southern District and State of California) S.S
of the City and County of San Francisco.)

ALVIN GERLACK, being first duly sworn, deposes and says:—

That he is an attorney-at-law duly admitted to practice before all Courts of the State of California and the United States District Court for the Central Division of the Southern District of the State of California and has his office at Number 220 Montgomery Street in the City and County of San Francisco, State of California, and is the attorney for plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and the same is true of his own knowledge except as to the matters which are therein stated on his information or belief and as to *thos* matters that he believes it to be true; that the plaintiff is absent from the City and County of San Francisco where affiant has his office and for that reason affiant makes this verification on plaintiff's behalf. That there is not sufficient time to have said complaint verified by the plaintiff personally.

Alvin Gerlack

Subscribed and sworn to before me this 27th day of December, A.D., 1932.

[Seal] Henrietta Harper

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 28, 1932 R. S. Zimmerman, Clerk.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE ON UNITED STATES ATTORNEY AND MAILING NOTICE TO ATTORNEY GENERAL UNDER TUCKER ACT AND WORLD WAR VETERANS ACT AS AMENDED.

UNITED STATES OF AMERICA)
State of) SS
County of)

HANS A KRUGER, being first duly sworn, deposes and says: That he is the clerk for the attorney for plaintiff in the above entitled action. That on the 7th day of January, 1933, he served a copy of the complaint on file herein, together with a copy of the Notice of Filing Complaint against the United States under the Tucker Act of March 3, 1887, and the World War Veterans Act as amended, on the United States Attorney for the Southern District of California, by giving to and leaving with said U. S. Attorney, true and correct copies of each of said papers.

That on the 6th day of January, 1933, he mailed to the Attorney General of the United States, Washington, D. C. full and complete copies of each of said foregoing papers, by registered mail, postage thereon fully

prepaid, and deposited the same in the United States Postoffice at San Francisco, Calif. addressed as follows: "The Honorable the Attorney General of the United States, Washington, D. C." Registered, Return receipt requested."

Hans A. Kruger

Subscribed and sworn to before me this 17th day of March, 1933

[SEAL] Thomas A. Daugherty

Notary Public in and for the County of Los Angeles State of California.

[Endorsed]: Filed Mar. 21, 1933. R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

[Title of District Court and Cause.]

ANSWER.

Comes now the United States of America, defendant in the above-entitled cause, by its attorneys, Peirson M. Hall, United States Attorney for the Southern District of California, and Ignatius F. Parker, Assistant United States Attorney, and H. C. Veit, of counsel, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering the allegations contained in paragraph I of first cause of action of plaintiff's complaint, defendant alleges that it is without sufficient information or belief to enable it to answer, and on that ground denies each and every allegation contained therein.

II.

Answering the allegations contained in paragraph II of first cause of action of plaintiff's complaint, defendant admits each and every allegation contained therein.

III.

Answering the allegations contained in paragraph III of first cause of action of plaintiff's complaint, defendant admits that Frances Hill entered the armed forces of the defendant on the 28th day of March, 1918, and that she was honorably discharged therefrom on or about February 3, 1919.

IV.

Answering the allegations contained in paragraph IV of first cause of action of plaintiff's complaint, defendant admits that during the time Frances Hill was in the service of the defendant she applied for and was granted a policy of insurance in the amount of $10,000.00. Defendant alleges that said insurance was payable in monthly payments of $57.50 each in the event the insured suffered permanent and total disability while the same was in full force and effect. Defendant admits that premiums on said policy of insurance were regularly paid up to and including the premium for June, 1919.

V.

Answering the allegations contained in paragraph V of first cause of action of plaintiff's complaint, defendant denies each and every allegation contained therein.

VI.

Answering the allegations contained in paragraph VI of first cause of action of plaintiff's complaint, defendant denies each and every allegation contained therein.

VII.

Answering the allegations contained in paragraph VII of first cause of action of plaintiff's complaint, defendant denies that the insured's claim was denied on December 16th and avers that it was denied on December ~~admits each and every allegation contained therein.~~ 10th, 1932 and that the denial was mailed on Dec. 16th. [Amended by order of 9/24/35 M.R.Winchell Dep.Clerk]

VIII.

Answering the allegations contained in paragraph VIII of first cause of action of plaintiff's complaint, defendant denies each and every allegation contained therein.

IX.

Answering the allegations contained in paragraph IX of first cause of action of plaintiff's complaint, defendant admits that attorney fees are payable as provided by Section 500 of the World War Veterans Act as amended. Defendant alleges that it is without sufficient information or belief on the remaining allegations in said paragraph to enable it to answer, and on that ground denies each and every allegation in said paragraph not herein specifically admitted to be true.

Answering the allegations contained in the second cause of action of plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraph I of second cause of action of plaintiff's complaint, defendant incorporates herein paragraphs I, II, III, IV, V, VII and IX of its answer to first cause of action herein, in this its answer to plaintiff's second cause of action and makes them a part hereof, the same as if expressly set out in full herein.

II.

Answering the allegations contained in paragraph II of second cause of action of plaintiff's complaint, defendant denies each and every allegation contained therein.

III.

Answering the allegations contained in paragraph III of second cause of action of plaintiff's complaint, defendant denies each and every allegation contained therein.

WHEREFORE, defendant, United States of America, prays that plaintiff take nothing by this action; that plaintiff's complaint be dismissed; that judgment be rendered in favor of defendant for costs incurred herein, and for such other and further relief as may be meet and just in the premises.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.

Ignatius F. Parker
IGNATIUS F. PARKER,
Assistant United States Attorney.

H. C. Veit
H. C. VEIT,
Of Counsel.

[Endorsed]: Filed Jun. 14, 1933. R. S. Zimmerman, Clerk By Theodore Hocke, Deputy Clerk.

At a stated term, to wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 24th day of September in the year of our Lord one thousand nine hundred and thirty-five.

Present:

The Honorable Harry A. Hollzer, District Judge.

FRANCES HILL,	)	
Plaintiff,	)	No. 6155-H
vs.	)	LAW
UNITED STATES OF AMERICA,	)	
Defendant.	)	

This cause coming before the Court for trial * * * E. D. Fooks, Esq. now moves the Court to amend Answer, to which motion Alvin Gerlack, Esq. objects; whereupon, the Court orders that Answer may be amended as set forth by counsel for the defendant and the amendment is thereupon made by the clerk.

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 8th day of December in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

Frances Hill, Plaintiff,	)	
	)	No. 6155-H
vs	)	Law
	)	
United States of America, Defendant.	)	

This cause coming on for trial; * * *

Counsel stipulate as to certain facts.

Pursuant to stipulation, it is ordered the second cause of action is hereby dismissed. * * *

At a stated term, to wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 11th day of December in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable HARRY A. HOLLZER, District Judge.

Frances Hill	)	
Plaintiff,	)	No. 6155-H
vs	)	Law
United States of America, Defendant.	)	

This cause coming on for further proceedings on trial; * * *

The Court instructs the jury; There are no exceptions taken to instructions to the jury; * * *

At 6:10 p.m., in the Court's Chambers, it is stipulated and ordered that the jury be taken to dinner at 6:30 p.m. at the expense of the government, and that if the jury should reach a verdict by 11:00 p.m., a sealed verdict may be handed to the Clerk to be returned in open Court at 9:45 a.m., December 15, 1936, and the jury be instructed to return at said time 9:45 a.m. December 15, 1936. * * *

At 9:35 p.m. the jury return into court and the clerk asks if they have reached a verdict. The foreman replies that they have and hands the Clerk a sealed verdict.

Pursuant to order heretofore made, the jury are instructed by the Clerk to return December 15, 1936, at 9:45 a.m., at which time the verdict will be opened.

At a stated term, to-wit: The September Term, A. D. 1936, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 15th day of December in the year of our Lord one thousand nine hundred and thirty-six.

Present:

The Honorable: HARRY A. HOLLZER District Judge.

Frances Hill, Plaintiff,	)	
	)	No. 6155-H
vs	)	Law
	)	
United States of America, Defendant.	)	

This cause coming on for further proceedings on trial and return of sealed verdict; Alvin Gerlack, Esq., appearing for the plaintiff, who is present, and Ernest D. Fooks, Attorney, Department of Justice, appearing for the defendant; Ben Bell being present as official court reporter; and the eleven jurors being present;

The Court asks the Jury Foreman if the sealed verdict in the custody of the Clerk is similar to the sealed verdict given to the Clerk, and the Jury Foreman answers that it is; whereupon,

It is ordered that the Clerk open, read, and record said verdict, and the Clerk opens same, and reads said verdict, the verdict being as follows:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

Frances Hill, Plaintiff,	)	
	)	VERDICT
vs.	)	No. 6155-H
United States of America, Defendant.	)	Law
	)	

We, the Jury in the above-entitled cause, find for the plaintiff, Frances Hill, and fix the date of her total and permanent disability from following continuously any substantially gainful occupation from January 1, 1919.

DATED LOS ANGELES, CALIFORNIA, DECEMBER 11, 1936.

MARK H. HARRINGTON
Foreman of the Jury.

[Endorsed]: Filed, Dec. 15, 1936, R. S. Zimmerman, Clerk, By L. Wayne Thomas, Deputy Clerk.

IN THE CENTRAL DIVISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FRANCES HILL,	)	
	)	
Plaintiff,	)	No. 6155-H
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

JUDGMENT

This cause came on regularly to be tried on the 8th day of December, 1936, and was thereafter regularly continued to the 9th day of December, 1936 and thereafter regularly continued to the 10th day of December, 1936 and thereafter regularly continued to the 11th day of December, 1936; Alvin Gerlack, Esq., appearing as counsel for the plaintiff and Hon. Peirson M. Hall, United States Attorney, and Ernest D. Fooks, Esq., attorney, Department of Justice, appearing as counsel for the defendant.

A jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiff and defendant were sworn and examined, and documentary evidence on behalf of the parties hereto, was introduced. After hearing the evidence, arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court their verdict in words and figures as follows, to-wit:

(Title of Court and Cause)

VERDICT OF THE JURY.

"We, the jury in the above entitled cause, find for the Plaintiff, FRANCES HILL, and fix the date of her permanent and total disability from following continuously any substantially gainful occupation from January 1, 1919.

Dated: Los Angeles, California Dec. 11, 1936.

MARK H. HARRINGTON
Foreman of the Jury"

And the Court having fixed plaintiff's attorney's fees in the amount of ten per centum (10%) of the amount of insurance recovered in this action:

IT IS ORDERED ADJUDGED AND DECREED that Frances Hill the plaintiff, do have and recover from the United States of America the defendant, the sum of Nine Thousand Six Hundred and Sixty Six and no/100 Dollars ($9,660.00), being one hundred and sixty eight (168) accrued monthly installments of insurance at the rate of $57.50 per month beginning January 1, 1919 up to and including the monthly installment due December 1, 1932, less plaintiff's attorney's fees as herein provided.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant the United States of America, deduct ten per centum (10%) of the amount of

insurance recovered in this action, and pay the same to Alvin Gerlack, of San Francisco, California, plaintiff's attorney, for his services rendered before this court, payable at the rate of ten per centum (10%) of all back payments, and ten per centum (10%) of all future payments which may hereafter become due on account of such insurance maturing as a result of this judgment, said amounts to be paid by the defendant's Veterans Administration or its successor if any, to said Alvin Gerlack or his heirs, out of any payments to be made to said Frances Hill or her beneficiary or estate in the event of her death before two hundred and forty (240) of said monthly installments have been paid.

Dated: December 17, 1936.

H. A. Hollzer
District Judge

Approved as to form:
Ernest D. Fooks
Attorney Department of Justice

Judgment entered and recorded Dec 18 1936 R. S. Zimmerman Clerk. By L. Wayne Thomas Deputy Clerk.

[Endorsed]: Filed Dec 18 1936 R. S. Zimmerman, Clerk By L Wayne Thomas Deputy Clerk.]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED that heretofore, to-wit, on the 8th day of December, A. D. 1936, in the City of Los Angeles, State of California, in the said District, upon the issues joined herein, the above entitled cause came on for trial before the Honorable Harry A. Hollzer, a Judge for the Southern District of California.

Plaintiff appeared in person and by her attorney, Alvin Gerlack, Esq. Defendant, United States of America, appeared by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice. A jury having been duly impaneled and sworn to try said cause;

WHEREUPON the following proceedings took place:

"The government admitted the following facts: That plaintiff is a resident of the Southern District of California and the County of Los Angeles therein; That the cause of action contained in paragraph 2 of the complaint is brought under the provisions of the World War Veterans' Act, and any and all amendments thereto; that plaintiff enlisted as a nurse in the Army Nurses' Corps on March 28, 1918, and was discharged February 3, 1919; that during the war she took out a policy of war risk term insurance in the amount of $10,000.00, payable in the event of permanent and total disability at the rate of $57.50 per month; and that the premiums were paid through the month of July, 1919, which would make the insurance in force up to and including midnight of August 31, 1919, by reason of the 31-day grace period; that the allegations of paragraph 7 of the complaint, alleging a

disagreement, are admitted; that all of the allegations of paragraph 9 of the complaint are admitted by defendant; that plaintiff's insurance was in force and effect until midnight August 31, 1919."

"FRANCES HILL

the plaintiff, called as a witness in her own behalf, having first been duly sworn testified under oath as follows:

DIRECT EXAMINATION

I entered the Army in Little Rock on May 28, 1918. I went overseas with Medical Unit T. It was a part of the medical unit of the army. I was born in Batesville, Arkansas, about 80 miles from Little Rock. I took my training as a nurse at St. Vincent's Infirmary, Little Rock, Arkansas. I graduated from there as a graduate nurse. At the time I went into the Army I was doing private duty nursing in Little Rock. Most of my work was at St. Luke's under Dr. Kirby and Dr. McGill. They were the staff doctors. I had no serious difficulty with my health at the time I went into the army. I went through training without any loss of time from sickness. At several different times I was given physical examinations by the army doctors when I went into the army.

The Government then stipulated that Miss Hill was in good health at the time she entered the army.

(Witness continuing) When I went overseas I sailed from New York sometime during the 1st of May, 1918. I went to Liverpool at first but I didn't remain in Liverpool that time. I was sent to the Southern part of England, near Southampton. Later I went back to Liverpool.

(Testimony of Frances Hill)

I spent about six months the latter part of 1918 at Liverpool with the same medical unit. We were not all together but practically all the nurses I started out with were in Liverpool with me. My commanding officer at Liverpool was Major Wolfsohn for awhile. We had another commanding officer at the time I was transferred to Liverpool. While I was in the service as a nurse in Liverpool at this army hospital under Major Wolfsohn the most unusual thing that happened to me so far as my health is concerned is that I was working hard. There were 26 of we nurses. We were supposed to have a 500 bed hospital but when the influenza epidemic came along we crowded in patients until we had a thousand patients in a 500 bed hospital and only 26 nurses to take care of that number. We didn't have any extra nurses to take care of this load. There was no place to get extra nurses from. This happened the latter part of September in 1918. We were supposed to be on duty under normal conditions—supposed to work eight hours. a day. In October, 1918, at the time of the influenza epidemic after we had begun to receive the influenza patients, we had orders not to go off duty when night came. The beginning of my experience with the flu was on a Sunday morning, and we had orders not to go off duty that night, and I worked 36 hours without going to my room at all, and the food that I ate, I ate while standing up. I didn't sit down during that time. We received these extra patients from the convoy from the States—transport from the States. I was working hard. I had been taking care of tuberculosis and receiving influenza patients and of course we had to put the influenza patients wherever we could find room for them. At that time I was taking care of influenza, also some

(Testimony of Frances Hill)

tubercular still. Concerning the effect this had on me personally—I was working hard. Of course, to begin with, I worked 36 hours without any time off, and then I would have four or five hours, and probably six hours' sleep, and worked the balance of the time. I didn't go to the dining room for my meals; I ate my meals on the ward whenever I had time to eat at my convenience, and of course, the patients were—quite a few of them were delirious and trying to climb out of bed and coughing, and especially one patient that I tried to hold in bed—I did hold him in bed. He was dying, coughing, and expectorated all over me. He spattered all over my face and glasses and cap. The mask that I was supposed to wear over my nose and mouth had fallen down in my struggle to try to hold him in bed, and I didn't turn loose of the patient, though, so long as he lived. When he quit breathing I took a piece of gauze and Lysol solution and washed off my glasses and my face, washed the pus off my lips, but I had to wear my uniform until such time as I could go off duty and change it. I wore it on and worked with this pus spattered all over me, all over my uniform and cap. The next thing that happened to me that was unusual so far as my health was concerned—I was still working long hours—at least 18 hours a day when I came down with influenza and pneumonia; that was sometime during the first of October. I was treated in my quarters as there was no room in the hospitals for the sick nurses. I was treated in my quarters by Major Wolfsohn. He was present at the time. He treated me personally, he visited me every day. I did not have a nurse to attend me . . . there was no nurse. I took care of myself the best I could. There were 3 of we girls in a small room together

(Testimony of Frances Hill)

—all nurses—all sick. I was the only one that had pneumonia. The others had influenza. We took our own temperatur*s*. My temperature at that time ran about 103 and 104 for about a week or ten days. I was in bed one morning when the doctor called on me, and my temperature was normal and, of course, I had a very bad cough at that time, and I was weak. I took my pulse at that time. I had a rising temperature, my pulse was rapid. I felt weak and bad, but I felt better this Monday morning. One morning when Dr. Wolfsohn called on me, and he asked me if I felt like dressing myself, and I told him I did. He told me to dress myself that afternoon and if I felt like it to walk out as far as the big gate, which was probably a hundred feet from the front door of the administration building. The nurses' quarters were in the administration building.

I dressed myself and, of course, I really didn't feel like walking out there, but then I was trying to make believe. I walked out to the big gate very slowly, and on my way back I collapsed on the doorsteps. My heart pounded like it would stop. In fact, I think it did stop just for a second. I just collapsed, I was so weak I couldn't get any further. I lay there for a few minutes, and there was a nurse came along and helped me back to my bed—a Miss Ready, one of our nurses there. Then I stayed in bed. I undressed myself and went back to bed, and stayed in bed until the next morning. I went on duty the next morning. I was still awfully weak, my heart pounding every time I would walk. I went on duty just the same, we needed the nurses so badly. The nurses were all working until late at night. After that I stayed on duty for ten days, or a week—I don't remember how long—it was

only a short time; but after I had been on duty a day or two I found I was having a rising temperature. I found it was 101, and finally it was 103. This was while I was nursing on these wards. I just turned weak on the ward and I dropped a glass of thermometers and broke the whole business, so I was ordered back to bed then by Dr. Wolfsohn. This time they admitted me to the ward, like they did the other patients. At that time I was treated ten days or two weeks, I believe. Dr. Wolfsohn treated me. He continued to treat me for that time. He wasn't the ward's doctor. There was another doctor, but Dr. Wolfsohn also visited me at least once a day. After that I felt better. My temperature went down to normal—that is, they found it normal at least. I felt pretty good, then I went back on duty again. I left Europe to come back to the States the latter part of December, 1918. At the time I left England I felt very badly. I coughed all the time; I never felt like getting out of my bed in the morning when I left Liverpool. Then I had orders to come back to the States. When I came back to the States I landed at Hoboken. I didn't go back on duty then. I wasn't able to do duty. I was in bed all the way home on the boat, and when I arrived in Hoboken I was sent to—it was the Army hospital at that time, but it was the old Polyclinic Hospital. I don't remember what number—I believe, Army Hospital No. 4.

I stayed there a few days. I wasn't able to do duty, and I stayed there only a few days when I was sent to the Hotel Albert. At that time the Hotel Albert was the headquarters for overseas nurses. In other words, the Government was using it for a barracks for the nurses. I wasn't on duty at all at the Hotel Albert. I spent my

time in bed there. I left the army—I left New York the latter part of January of that year. I was sick in bed when I was notified to go down to get my traveling orders, and I stood in line with 300 other nurses to get my traveling—I was not given an examination at the time I left the Hotel Albert to go to my home. I didn't see a doctor. If he was a doctor I didn't know it. The man that gave me my traveling orders, he didn't—he didn't appear to be a doctor. When I left I left the Hotel Albert for home the latter part of January. I was discharged from the army February 3, 1919. I was in the army during the time I was on the way home and after I got home.

After I got back to Little Rock I rested for awhile. I didn't feel good at all when I went to Little Rock, and, of course, I rested for awhile and I was examined by Dr. Kirby and Dr. McGill. This was along the 20th of January when I was examined in St. Luke's Hospital. I arrived back in Little Rock on the 16th, but I had been home a few days before I had this examination. I went there for this examination because I was sick. They were the doctors that I had worked under before I went away. I had a rise of temperature every day. I had a very severe cough, and my heart was pounding every time I did any exercise of any kind, and I had these weak spells at any time I tried to go up and down the steps very much, and I would almost collapse. In fact, I had to be helped up the steps to the X-ray rooms in St. Luke's Hospital at the time that my chest was X-rayed. That examination was prior to my discharge. It was around the 20th of January and my discharge was February 3rd.

Dr. Kirby and Dr. McGill treated me for my chest. They treated me also for my stomach which was upset.

(Testimony of Frances Hill)

They prescribed something for my stomach. Dr. Kirby gave me several different precriptions. Dr. Kirby is now dead. He passed away in 1922. He gave me a prescription for my cough. After that I tried to work and follow my occupation as a nurse. I tried to work—I registered for duty. It must have been two or three months after I had been home when I registered for duty, and for light cases—not night work. I worked in Little Rock on short cases. I don't believe I was ever able to continue one case that lasted longer than three or four days, because I was weak. I couldn't go up and down the steps without resting. My heart pounded and I coughed. The doctors advised me to go to a dry climate for my health, which I did. I stayed around Little Rock before I went West from the time that I arrived home in January until around the 1st of November of that same year, 1919. There is no way to say correctly how much I worked during that interval from January or February up until the time I left in November of 1919—how much I actually worked, putting in time, working on the job for which I was paid. I worked very little. I worked three or four days at a time. I didn't work enough to pay my expenses at any time. It wouldn't amount to a half or third of the time. I wasn't registered for duty half of the time—I didn't work one-third of the time while I was in Little Rock because my temperature was never normal during that summer. I only registered for duty half of the time, that means I could work if a call came in, that is what it would mean if I was registered. After I had been home two or three months is when I registered. My name would be off the register at different times until I left in November, 1919. When I went on a case I would take it off. It

might not be put back on for—for instance, if some friend should call me on duty, not call me through the registry, my name being on the register didn't mean an awful lot. Any time I wanted a call from the registry I would call up and register. After I had once placed my name on the nurses registry, then every time I had gotten a job I would have to wait and finish the job before I could be registered again . . for call. My name would be there but it wouldn't be for call—on call. In other words, until I notified them that I had finished a job they wouldn't expect to call me. When I was on call I was available for duty. I was on call very little of the time that summer, I couldn't say how much. I was available to go out on a case from the time I registered, which was two or three months after I came back, until I left in November 1919. I wasn't on call one-third of the time, I don't believe. Of that one-third of the time that I was on call, I worked very little during that summer. I couldn't say just how much I worked, but I worked very little. I didn't work enough to pay my room and board, I know that much.

I left Little Rock on account of my health, cough and these continuous weak spells that I would have. I thought that I might find a climate that would be better for me. I went to Tucson. I came by way of El Paso but I didn't stay at El Paso at that time. I do not have any acquaintances or friends in El Paso. I did not have any friends or acquaintances in Tucson. I had never been there. I didn't know a soul in Tucson. I remained there—arrived there after the first of November, 1919, I stayed the latter part of February, 1920. While in Tucson I tried to work at different times but I had pleurisy something terrible in Tucson, and I coughed all night. And I would put my

name on call and if I was called out on duty, I wouldn't work because I had no one to befriend me there, and I couldn't stand the work at all. I probably worked two weeks out of the four months; no longer than that. While in Little Rock out of the six or seven months, I was on call at the registry in Little Rock, after I came back, putting it all together I probably worked three or four weeks out of that six or seven months. I left Tucson because I wasn't any better. I didn't seem to be any better there, so I decided I would go back to El Paso and try. I didn't have any friends at all in El Paso. At that time I didn't know a soul in El Paso. When I got to El Paso I rested a few days and, as usual, I registered for duty. I stayed at El Paso after I went there from Tucson the latter part of February, 1920—I was out of the city at different times but I called that my home until April 1922, but I stayed all the time there. While I was in El Paso I did X-ray work while I was there. This vocational training I did in 1921 with Dr. Cathcart. That is vocational training under the Veterans Bureau of the Veterans Administration, it was the Public Health at that time—it was the Federal Board for vocational training. I was in vocational training six or seven months. The government gave me vocational training—they advised me that it would be shorter hours and that I might be able to do the work.

I didn't get along so well in X-ray work. I found it very interesting work and I like it very much but there was a part of the work that was entirely too heavy for me to do, such as winding up the X-ray tables for the fluoroscope, the old fashioned X-ray tables had to be used for the fluoroscope, and that was too heavy for me to do. I would have to stop to gasp for breath any time I tried to

wind this table up. It was just a flat table; it was used for X-ray. When they used it for the fluoroscope we would have to wind a big lift to bring it straight up and down, in other words, it would have to be vertical. It was rather a heavy table. It would wind up like all X-ray tables. The effect of this winding of that table had on me personally was to make me very short of breath. I couldn't wind it up without resting two or three times during the time I was trying to wind it up, and of course that would delay everything and Dr. Cathcart didn't like me to wind the table up. Going back to the time of my discharge, I spoke of having certain symptoms. I said I had pleurisy. I had pleurisy from the time I had pneumonia while I was in Liverpool. The left part of my chest is where I had these pleurisy pains. The pleurisy pain was in the left (illustrating). Sharp pain in my left shoulder any time from exertion. I am indicating the lower part of my back, the left side (indicating), is where I had the most trouble with pleurisy pains. The sharp pain in my left shoulder, that was different. Any time from exertion it was in my left shoulder. The first time I noticed that was the time I collapsed on the steps when I walked out to the big gate in Liverpool. I still have those pains. I have a sharp pain in my shoulder now, yes. I have the pleurisy pains occasionally. Concerning how frequently I would have these pleurisy pains from the time I had them in England in 1918 up to the present—any time from exertion; going up and down the steps; anything that would cause shortness of breath. I am speaking both of the pleurisy pains and the pain in my shoulder; the pleurisy pains and the sharp pain in the shoulder are both brought on from exertion, from walking up and down and going down the steps, especially if I try to hurry.

(Testimony of Frances Hill)

Going back to the time I was discharged, so far as bodily sensations are concerned, with particular reference to my health, I felt, well, at times I felt a little better than I did at other times, but I continued to catch cold very easily. I have a cold now. It has been that way throughout all these years. I catch cold very easily, and I cough, and then it seems to get a little better and I continue to have these weak spells. Describing these weak spells, well, from any exertion like going up and down the stairs, working for a few hours at a time, all of a sudden I turn weak and sometimes I get over it in a short time. There have been times when I didn't get out of my bed for three weeks when I had one of these weak spells. Concerning how long these weak spells would last when they first started—the first one was in Liverpool, England. I didn't get entirely over it that day but I felt well enough. Speaking in reference to these weak spells that I have described and how frequently they have been from the time I had this initial attack in England—no certain time. It might be—if I am not doing anything, if I am in bed, why of course I don't have them, if I am resting most of the time. The frequency with which I would have them are —any time from over-exertion; any time from work. I couldn't tell you how many of these spells I have averaged a year since 1917 or 1918, but I would have them often. I have had them often—as often as I exert myself. Every time I have tried to work I would have to go off duty any time I happened to be on a hard case. It has been oftener than once a month; sometimes I would have them every day. When they start they do not always last the same. As I have said before, one time was three weeks. I was too weak to go to the bathroom. Concerning the colds and how long they have lasted—no certain time; some

times it was better in a few days, and sometimes it has been months. I feel like I have the same cold or concurrent colds. I am catching cold all the time. I have never been entirely over that feeling of catching cold all the time —cough in the morning. I am always weak in the morning. I have had that all the time since 1918. I am short of breath all the time. Sometimes I feel a little better than other times. Compared with the way I felt at the time of the last trial in October I feel a little better now than I did last summer. I was in bed nearly all last summer, but I felt a little better during the past month than I did last summer, but still, I have had the weak spells. I have had the pain in my shoulder and the shortness of breath, and at times it seems my heart has stopped entirely. I will jump up in the middle of the night and I will get up and gasp for breath, and I will believe my heart has stopped for a space of seconds. That happens any time. I go to bed unusually tired. Of course, I have that tired feeling every morning when I get up—so tired, and tired in my chest, that I can hardly breathe, and at times I have felt I couldn't go on any longer when I was on duty; but, of course, I would go on as long as I could.

Getting back to my industrial history—I covered 1919 and 1920. In 1919 I was in Little Rock; in 1920 I was between Tucson and El Paso. Then in 1921 I was also in El Paso. I left El Paso in 1922. In 1921 I had the vocational training. I didn't try to nurse, unless it was a couple of days at one time. The latter part of the year I worked two or three days during the latter part of 1921 as a nurse, but I had the vocational training at the beginning of the year. At that time work was plentiful.

(Testimony of Frances Hill)

It was always plentiful; they were always calling for nurses. Nurses were scarce and work was plentiful.

In 1922 I went to Globe, and took a position in Globe, Arizona, I left El Paso because I was always looking for an easier job, something that I could do. I wasn't able to do the work in El Paso, and the nurses' registry in El Paso sent me to Globe, Arizona . . . was supposed to be an easy position. I worked there six weeks or two months, I would say. I quit that job because I couldn't stand the work. It wasn't hard work but I was short of breath and I coughed all the time, and I had this severe pain in my left shoulder and pleurisy, and also the pain in the right knee that has bothered me. I first had the pain in my right knee in 1922 when Dr. Kirby removed my tonsils in 1919. Dr. Kirby removed my tonsils in June or July, it was in the summer. The pain didn't go out of my knee when he took out my tonsils. You see, I had a rise of temperature all that summer. It would be a hundred and a hundred and six-tenths all that morning, and he treated me and advised me to have them taken out. I didn't feel any different after than I did before. I had the pain in my knee and sometimes, when I got weak, at first I had to hold onto the bannister. After I was in this hospital six weeks in Globe I rested for a while, and I took a position in the Inspiration Hospital in Miami. I worked at the hospital in Miami three or four weeks. I quit because I couldn't stand the work. During the balance of 1922 I rested a little while and went to Kingman and I took a position. I couldn't stand the work there. In Kingman I was in a general hospital. I left there in November, 1922, and went back to Phoenix, and I had a severe cold. I worked in Kingman two months . . . October and Novem-

(Testimony of Frances Hill)

ber . . . I mean September and October . . . I left that job because I couldn't stand the work. I didn't feel any different on that job than I had on previous jobs. I had the same symptoms. I had a severe cough. After that I went to Phoenix. I had a severe cold when I got to Phoenix and had a high temperature, and I went to bed . . . still in 1922. The balance of 1922 I didn't do anything. I stayed in bed and rested and Dr. Tuthill in Phoenix treated me. In 1923 —the first of January 1923 I started to work for Dr. Wheeler at the Indian Sanitarium . . . that was a government job. Dr. Wheeler was a government doctor at the time in the Indian Service. I worked in the Indian Sanitarium until the latter part of July (1923) . . . I went to work the 1st of January, and I was there until the latter part of July; but I didn't work all the time. I had a two weeks vacation, and I was sick at different times. I was in the Indian Sanitarium several months. I didn't get along very well with my duties there in the sanitarium. I didn't have bedside nursing to do. I had dispensary work, and I would work a couple of hours in the mornings, and sometimes that would be all the work I would have to do; but I wasn't able to hold the job at all. I was weak and tired. I was weak and tired, I was too weak and tired to get out of bed some mornings, and I worked there every day I could work while I was there. I quit the job in July on the advice of Dr. Wheeler. He advised me to take an extended rest. I wasn't Civil Service there. I was temporary. A temporary appointee. My salary on that job was about $80.00 a month, I believe. That included my room and board. I don't remember what they deducted for room and board. The salary was supposed to be so much a year and so much deducted for my room

(Testimony of Frances Hill)

and board. That was in July, 1923 I quit the Indian Sanitarium. The balance of that year I rested until the latter part of October, I believe it was, when I went to work in Hayden, Arizona. . . . That is the Dr. Wheeler whose deposition is on file here. . . . I worked in the Smelter Hospital in Hayden—I was there until April the next year, 1924. I was doing very light work there. Two or three weeks after I went there we didn't have a patient in the hospital. I had to answer the telephone, and remove a cinder from a man's eye, or dress a finger, or do something like that, and receive the doctor's calls. That was my work for two or three weeks, and after I went there we had a few patients during the winter—a couple or three bed patients during the winter. When I wasn't working there and didn't have any particular duties to perform I rested in bed any time I had nothing else to do. This was permitted by my employers. They understood that I was to rest when I wasn't working. I had a bed in the hospital when I rested, and I could hear the telephone ring and the door bell ring and I could get up and answer, and go back to bed. I left that job because I couldn't stand the work any longer. I wasn't able to get out of bed—pleurisy and shortness of breath—that was April, 1924, I quit there.

The balance of 1924—I didn't work that summer. I went back east and spent the summer with my people there, back at Little Rock. That is not the first time that I had been back to Little Rock since I left there in 1919. I was back there every year during that time. They sent for me every year. Some time during the year I would spend two or three weeks back there. During the summer I had taken the Civil Service examination for the position

(Testimony of Frances Hill)

at the Indian School hospital in Phoenix and the latter part of September I went back to Phoenix to the Indian School Hospital. I was not given a thorough physical examination in connection with that Civil Service Job, just a routine—asked questions. The Veterans Bureau had examined me in the spring of 1924—Dr. Fred Holmes. In the winter—it might have been in the winter of 1924, I believe it was—I held that job in the Indian School from the latter part of September until February. That is from September 1924, to February 1925. Well, the work—I didn't get along very well on that job. There again I had a bed. My room joined the girls' ward. It was a regular school hospital—school children were my patients and my room joined the girls' ward, and there again I had a cold. I had a telephone in one room; I could rest when I wasn't working, and answer the calls, which I did, and managed to get by as best I could until February. I quit in February because I couldn't stand the work any longer. I had pleurisy and this weakness, this shortness of breath Dr. Wheeler, the government doctor in the Indian service, treated me while I worked at the Indian Sanitarium. No government doctor treated me while I was at the Indian school. The balance of 1925—I didn't do anything that summer. In the fall of 1925 I did a couple of private cases, short cases, when I felt like going out on duty. At times I had my name registered at the registry in Phoenix during this time. Concerning the method of registering at the registry: I registered at the registry. I went up there and told them I am a nurse and available for duty, and they registered my name. When I say on call I mean they have my name on the registry and somebody, we will say, comes in and asks for a nurse,

and my name is there and they send me out on a case. The registry has a place to slip my name back to one side. I still belong on the registry, but I won't be on call. Suppose I take a case and am on the case for three or four days. Then I go off of it—I don't notify the registry until I am ready to go back on duty. If I am on a couple of days and go off, the registry wouldn't know anything about it for months. The registry keeps my name to one side until I notify them I am ready for duty again. The balance of 1926 after I left the Indian School, I did some private duty nursing. During 1926 I registered for private duty nursing like the short cases. I did some private duty nursing. I was never able to take care of a case that was very hard, and worked only a few days at a time without rest. I have never worked a week straight at any time without rest. I never stayed on a case more than a week—not a week. I have never worked on a case more than a week. Sometimes, one day I wouldn't be able to go on duty next morning, wouldn't be able to get out of bed. Nurses were scarce during that time. There were a lot of calls for nurses. If I were to put all the days together when I did private nursing in 1926, it probably would not amount to four or five weeks during the year. I didn't work very much during 1927. I was sick in bed part of the time, and part of the time I was up. I felt a little better at times, and some private duty; never enough to pay my expenses at any time. In the winter of 1928 I was in bed practically all winter with a woman taking care of me. In 1928 I didn't work from Christmas, 1927, until April I believe it was, 1928, because I was sick in bed all that winter. The balance of 1928 I would take a short case occasionally. If I were to put all the days together I worked, it would be about the same as I had been working

before that time. I would work a few days at a time and sometimes I would rest, and sometimes I was able to take care of myself, and I was ill, and then again I wasn't able to take care of myself. I worked when I felt like it and I couldn't say positively how *many I* worked.

In 1929 I was sick in bed all winter—the winter of 1928 and '29—the beginning of 1929. I didn't work from January until the spring again . I was in bed most of the time from the fall of 1928 to the spring of 1929 of that winter. The balance of 1929 I had a few short private cases, worked when I felt that I could. I did not work for any copper company hospital, either in 1928 or 1929.

At this stage of the trial the following proceedings took place:

BY MR. GERLACK:

Q When did you first consult Dr. Cohn?

A In 1929, the fall of 1929. It was in December. I was in Los Angeles, and I went to Dr. Cohn, for an examination.

Q That was Dr. Cohn of Los Angeles, here?

A Yes.

Q How did you come to go to him?

A He was recommended to me.

Q What is that?

A He was recommended to me.

Q Why did you go to him?

A Oh, I was sick. I was ill with pleurisy; same symptoms—weakness and shortness of breath, cough, rise of temperature.

(Testimony of Frances Hill)

Q What brought you to Los Angeles on that occasion?

A I came with a patient over here.

Q And while here with your patient, you consulted Dr. Cohn?

A Well, I wasn't with the patient when I—after I brought him over here I went to see Dr. Cohn, and I stayed over here a little while.

If I were to put all the days together that I worked in 1928 doing private nursing, I couldn't say how many days I worked, approximately. Probably around six—four or six weeks, probably. I couldn't say for sure if that would be correct. But the longest period I ever worked in a stretch during 1929—I have never worked a week at any one time without relief since 1918 while ill with pleurisy and pneumonia overseas. I have never worked a week at any one time without relief. I had one or two private cases during 1930. I was in Phoenix all this time. After I came out with this patient to Los Angeles I went back to Phoenix immediately. I had my name on the registry at this time. I had belonged to the registry all that time. I had a couple of private duty nursing cases in the first part of 1930. I was sent by the nurses' registry to Superior, Arizona—sent by Dr. Swackhammer. If I were to take all the days together, putting all those days of private duty nursing together, up to the time I went to Superior—during 1930, I didn't work very much; probably two or three weeks. I started in to work at Superior the first of September, 1930, and I stayed there until the first of February, 1931. My duties on that job were general nursing—I did the buying of the groceries for the hospital—'phone orders. It was a very small hospital. We didn't have a patient in the hospital one time for six weeks,

(Testimony of Frances Hill)

just a small mining hospital. When I was supposed to be on duty there I spent my time—I had a bed in the hospital where I rested all the time. I could answer the telephone and the door bell, and it was opposite the dressing room door, and whenever a patient came in to have a finger dressed or have a cinder removed from the eye, I could get up and do that and go back and lie down, and I spent most of my time lying down. The Magma Copper Company owned the hospital. Concerning how I got along on that job as far as my health was concerned—how I felt, I always felt weak and tired and so tired in my chest that I could hardly get out of bed. At times I felt I couldn't go on any longer, but due to the fact that at times we didn't have a patient in the hospital, made it possible for me to stay on duty. And my knees gave me quite a lot of trouble that winter too. Dr. Swackhammer treated the rheumatic pain I had in my knee. It was treated by Dr. Swackhammer while I was there. During the rainy season it was quite severe and Dr. Swackhammer treated me. That is the same pain in the knee that I described as having in 1919. I left that job because I couldn't stand the work any longer. I couldn't get out of bed in the morning. I quit there in February, 1931. The balance of 1931 I rested. I came to Los Angeles—I came to San Fernando, California—that same year, 1931; that is a government hospital out there, at San Fernando. I was a patient in that hospital about eight months. I left there in November of the same year, 1931. They didn't give me any treatments, they just had me rest. I was in the T.B. ward there. I left San Fernando Hospital in November, 1931. I haven't done anything in the way of work since then.

(Testimony of Frances Hill)

At this stage of the trial the following proceedings took place:

BY MR. GERLACK:

* * *

Q What have you done since then?

A I haven't done anything in the way of work. I look after my—

Q (Interrupting) You haven't taken any cases at all?

A No.

Q. What other hospital have you been a patient in outside of San Fernando?

A You mean back during these years?

Q Any time since you were in the hospital as a patient in Liverpool, England?

A In 1920 I was a patient at Fort Bayard, New Mexico, in the tubercular ward.

Q That is the Government Veterans Bureau hospital there at Fort Bayard?

A Yes, it was called the Public Health hospital at that time.

Q What kind of a ward were you treated in there?

A Tuberculosis.

Q How long were you a patient at Fort Bayard?

A About three months.

Q What other doctors have treated you since 1919, besides Dr. Kirby and Dr. McGill?

A In El Paso Dr. Short treated me, and Dr. Long and the Government doctors were the ones who advised me and sent me to the hospital at Fort Bayard.

(Testimony of Frances Hill)

Q What doctor sent you to Fort Bayard?

A Dr. Tappin of El Paso. He was of the Veterans Bureau. He worked for the Government.

(Witness Continuing) I didn't pay premiums on my insurance after July of 1919, because I wasn't able to work to keep it up. I put in a claim for this insurance—filed the claim—on June 18, 1931, for insurance benefits. The first time that I heard I had any rights and had a right to assert a claim for this insurance was after I came to San Fernando. It was some time during the spring I would say, in May. I don't remember what day or what month it was, but I was admitted in the San Fernando hospital in April, and it was some time after I was admitted there that the Legion Commander called on me and he learned of my condition and he advised me about the insurance. I didn't know it. I didn't put in a claim prior to that time because I didn't know I could—that is the first time I knew I had a right to assert a claim.

CROSS EXAMINATION

The Government then introduced and had marked for identification as Defendant's Exhibit A, the Adjutant General's office record concerning plaintiff's military service and hospitalization during her service. There was then marked for identification government's Exhibit B, a statement made by plaintiff direct to the district vocational officers, District 14, Dallas, Texas, dated November 24, 1920. The government then offered and had marked for identification defendant's Exhibit C, which was an application for examination filed by the plaintiff for United States Civil Service, dated May 29, 1924. The government then offered and had marked for identification defendant's Exhibit D, being a certified copy from the Gen-

eral Accounting Office of the pay-roll record of payments made to the plaintiff as employee of the Phoenix Indian School, Phoenix, Arizona, the certificate having been issued February 27, 1923. The government then offered and had marked for identification government's Exhibit F, which was a document from the Adjutant General's office, dated November 5, 1925. It was then stipulated by counsel that the Adjutant General of the Army is the Secretary of the Army—the Secretary of the Army for the Secretary of War, and that all records of the army are kept in the office of the Adjutant General. The government then offered and had marked for identification Government's Exhibit next in order for identification, which was the Arizona State Nurses' Association, District No. 1, Nurses' Official Registry, Incorporated, Phoenix, Arizona, application for membership dated October 5, 1929, which document was identified by the plaintiff as being in her handwriting.

(Witness continuing) After I left El Paso about 1922, I went to Globe, Arizona, Gila County Hospital. Globe is approximately 96 miles from Phoenix. There is no mountain between Globe and Miami. It is just a little drive—they practically join.

At this stage of the trial the following proceedings took place:

BY MR. FOOKS:

Q Then, you remained in Phoenix, as I understand it, or in or near Phoenix? That is, you were in Superior, Hayden, Kingman and Phoenix, from 1922 until approximately 1929 or '30, is that correct?

A Yes, I was there nearly all of the time. At different times I was away from there.

(Testimony of Frances Hill)

Q Yes.

A I went East at different times and spent—

Q (Interrupting) When you say you "went East" you mean you went home to visit your people?

A Yes, yes.

Q Did you ever know Miss Florence L. Hicks?

A Yes, I have known Miss Hicks in a casual way.

Q She was a nurse was she not?

A Yes.

Q And a registered nurse in Phoenix?

A Well, I suppose she is. She is the registrar at this time, and she would have to be a registered nurse in order to have the registry.

Q Prior to that time when she had the registry, she was a nurse subject to call, the same as other nurses?

A Yes.

Q And you have worked with Miss Hicks on different cases on several occasions, have you not?

A I recall Miss Hicks. The first time I ever met her she relieved me on a case at the Good Samaritan Hospital. It was a very sick patient. I was called on the case sometime during the morning,—I would say, ten o'clock—sometime, anyway, during the morning, and the work that was required was too strenuous for me, and we had to call a relief nurse in the afternoon. I wasn't able to remain on the case because I couldn't. Due to my shortness of breath I couldn't hurry, and Miss Hicks was called to relieve me on that case, and that was the first time I recall meeting Miss Hicks.

Q You don't remember about when that was?

A Well, that was the latter part of 1926, I believe.

(Testimony of Frances Hill)

Q Yes. Now, at that time in 1926, Miss Hill, they had what was known as a two-shift system in vogue in Phoenix, did they not? In other words, 12-hour shifts?

A Well, that was one shift at times. You might stay longer with the patient if there wasn't very much to be done for them. Then, we had the afternoon off with the patient, if there wasn't an awful lot to be done with the patient.

Q Of course, if the patient was very sick, it was necessary to be on duty for the entire shift?

A And sometimes four nurses; sometimes two nurses to the shift, if they are very sick.

Q But, ordinarily, with the average case that had two nurses—day and night nurse—each nurse was on duty 12 hours?

A Yes, we had a shift that there was two nurses on duty each twelve hours.

Q Yes. After Miss Hicks took over the registry, who did she succeed?

A Miss Case—Bertha Case.

Q Miss Bertha Case?

A Yes.

Q She first had the registry and then Miss Hicks succeeded her? And you registered with that registry after Miss Hicks took it over, did you not?

A I have been registered with it at all times since 1922, before Miss Hicks took it over.

Q So that just brings us back to the possibly confused idea of just what registration means. In other words, you first registered in January 1922, did you not, with Miss Case?

A No, it was the latter part of 1922.

(Testimony of Frances Hill)

Q Yes.

A Because I had never been in Phoenix in January 1922.

Q Well, then, we will say sometime during the year 1922.

A The latter part.

Q The latter part. Then, from then on until you left Phoenix you were always registered with that registry, were you not? Your name was on the books as a registered nurse?

A I belonged to the Arizona State Nurses' Association.

Q Yes.

A So they always knew where I was. That is, they knew whether I was doing my work in Arizona or not, what I did. They didn't know all the time just where I was, or whether I was working or not, but my name was with them all the time.

Q So, when you were away on these various positions you had with different institutions, of course, they knew that you were placed at that time?

A They knew they sent me there. They didn't know how long I stayed.

Q Then you came back and advised them you were subject to call?

A They knew I was somewhere until I advised them, but they didn't know I was at that place. They still had my name, and they might send me my mail and say "For-

(Testimony of Frances Hill)

ward", but my name was still in the Arizona State Nurses' Registry during that time.

Q So, when you came back from those different institutions after your termination of service with them—that is, the period you were in Hayden, Kingman—and when you returned to Phoenix, when you felt able to go back to work you went back to the registry and notified them that you were then subject to call?

A I only had to call them up.

Q Yes.

A At different times, Mr. Fooks, I had registered for duty—do you mind if I tell this in my own words?

Q Sure, go ahead.

A One time, I recall that I was registered for duty and Miss Hicks called me and I was so hoarse I could hardly talk, and she didn't recognize my voice, and I said, "Well, Miss Hicks, I am sorry, I am not able to go on duty." So I might be on call, and when I was called I wasn't able to go on duty.

Plaintiff was then shown defendant's Exhibit F for identification, which was an application for the Arizona State Nurses' Association, dated October 5, 1929, which statement she identified as bearing her signature, together with her own handwriting in filling out the application. The application contained question 7, reading as follows: "What is the condition of your health? A. Good."

(Testimony of Frances Hill)

At this stage of the trial the following proceedings took place:

BY MR. FOOKS:

Q. Did you mean that at that time?

A. I wouldn't have been accepted if I hadn't signed that way. Certainly I didn't mean it.

(Reading)

"Q. Have you any physical defects?

"A. No.

"Q. What communicable diseases have you had?

"A. Measles, whooping cough, mumps.

"Q. Have you any tendency to constitutional or pulmonary trouble?

"A. No.

"Q. From what school of nursing are you a graduate?

"A. St. Vincent's Infirmary, Little Rock, Arkansas."

That is correct, is it not? A. Yes.

"Q. Length of course when you graduated?

"A. Two years, six months.

"Q. Date you finished?

"A. April 1, 1915.

"Q. Character of hospital?

"A. General—general.

"Q. Daily average number of patients in hospital during training?

"A. 250.

"Q. Are you a registered nurse?

"A. Yes.

"Q. In what states?

"A. Arkansas, Arizona, Reg. No. 493.

(Testimony of Frances Hill)

"Q. State how, where and for what period of time in each instance you have been employed since graduation?

"A. Private duty.

"Q. Has the state in which you graduated registration for nurses?

A. Yes.

"Q. Would you consider an institutional position, if so, state kind and what locality?

"A. No.

"Q. Would you take all classes of cases?

"A. No.

"Q. Have you any preference?

"A. Yes.

"State those that you register against.

"A. O.B."

(To Witness)

Q. What is "O.B."?

A. Obstetrical nursing.

Q. "D.T." What does that mean?

A. Delirium Tremens.

Q. "Mental" and then there is a dash "Barlow Brown." Can you explain what that means?

A. I registered against night duty. I don't know what you are speaking of.

Well, it has the answer, subsection (b) of question 18, "Will you take all classes of cases? Have you any preference"?

"A Yes.

"(b) State those that you register against—O. B., D. T., Mental, Barlow-Brown".

* * *

(Testimony of Frances Hill)

"Q Do you understand that in signing this blank you accept the rules and regulations of the registry, the schedule of prices as given in the rules, and that you will give it your loyal support?

"A Yes.

"Signature . . . . . "Frances Hill . . . . Date 10-5-29".

MR. FOOKS:

So, your answer is that you filled this out?

THE WITNESS: Yes, I filled this out.

Q And in answer to the question, "Have you any tendencies to constitutional or pulmonary trouble", which you answered "No", or "Have you any physical defects", you filled that out that way in order that you could get work?

A I wouldn't have been accepted if I hadn't have filled it out in that way.

Q Well, that is kind of evading my question, because that is a conclusion on your part. I am asking you why you filled it out that way.

A Because I had to in order for my name to be accepted.

Q Now, I observe, Miss Hill, that you didn't list in your classifications the preference. You didn't list that you did not want tuberculosis cases, you made no exception in this case. You took tuberculosis cases, did you not?

A Yes.

(Witness resuming): I am acquainted with Miss Florence Scales. She was nurse also employed at St. Luke's

(Testimony of Frances Hill)

Hospital, St. Luke's Home, I believe it is properly called, at Phoenix. She was head nurse there. She used to call me from time to time, not always through the directory, sometimes she called me direct. I did no private duty in Phoenix during 1923. She was head nurse at that time. In the fall of 19—the summer of 1923, was when I broke down under Dr. Wheeler, and I went away from Phoenix for a little while and rested—and then the next duty was in Hayden, Arizona, this mining hospital. That was the latter part of 1923. I was not called in the early part of 1923 by Miss Scales to take patients at St. Luke's Home prior to the time my health broke down—I was with Dr. Wheeler all that time. I wasn't on call for private cases. I was working with Dr. Wheeler from the first of 1923 until the latter part of July, then after that Dr Wheeler advised me I should leave and then I rested until October. After October I went to Hayden. In 1924 I went to work in the Indian School, during the fall of 1924, and I still had done no private duty. I might have been off a one day case at St. Luke's some time during that time. A man that knew me—I'll take that back. That was a mistake—I might have had a one day case during 1924. A man that knew me—I relieved another nurse for one day I believe, but I wasn't registered for private duty during 1924.

If the evidence should show from Miss Scales deposition that from 1923 to 1930 she estimated that I worked about one-half of the time, that is a misunderstanding. You see, Miss Scales was head nurse from 1923 up until 1930, but you understand, St. Luke's Home was only in Phoenix half of the time. They moved to the Mountains for half of the year and they are in Phoenix during the

winter months only. Miss Scales went to the mountains each time. She was head nurse during that period of time at St. Luke's, from 1923 to 1930. The last time I heard from her she was head nurse in tuberculosis sanitarium at Morris Plains, New Jersey.

I was working in the Indian Sanitarium in 1923. I quit that job in July 1923. I didn't take that job at the Indian school until the fall of 1924. I was not working at any government job between July 1923 and fall of 1924. During that time Miss Scales was head nurse at St. Luke's Home in Phoenix.

I am acquainted with Miss Bernice Ready. I met Miss Ready in El Paso. I had an apartment with her for about three or four months. Miss Bertha Case was in charge of the Nurses' Registry from 1924 to 1929. I was registered for private duty nursing the latter part of 1925. Prior to that time I had been on the registry going from these different jobs. There were two jobs that were government institutions. The Indian Sanitarium—I wasn't in Civil Service and I was only temporary there. In the Indian School I was under Civil Service. The other institutions with which I was connected were private mining institutions. Miss Case placed me on some of those institutional jobs. She put me on the first government job. That was temporary. She didn't place me on the job at the Indian school but she did place me on the job at the Indian sanitarium. Dr. Malloy treated me at different times, I don't remember when was the last time Dr. Malloy treated me or when I went to see him. It might have been 1931. One time Dr. Malloy treated me before I went to the Good Samaritan Hospital as a patient and one time

(Testimony of Frances Hill)

Dr. Brockway treated me. I believe Dr. Brockway is still in Phoenix. I believe I went to the Good Samaritan Hospital at Phoenix about May 1927. I was there about a week. I believe I was there at least a week. I went there for an operation for gall bladder and appendix operation. Dr. Paine Palmer was actually the surgeon and Dr. Brockway assisted in the operation. I wasn't awake, I wasn't conscious of that, but they were both to do the work. That was my understanding at the time. Dr. Palmer was called in. The two of them were to operate, it didn't make any difference which one. Dr. Malloy was not there at the time. He called in to see me—I recall his coming in to my room to see me, but he didn't treat me. He didn't have anything to do with the operation so far as I know. He didn't assist in administering the anaesthetic. As far as I know I did not have a general anaesthetic, I had gas and oxygen. I don't believe they followed that up with ether. I was to have gas, that was the agreement and that is what I paid for. After you are first out from under the gas you can easily tell from the taste in your mouth whether they had administered ether or not. They agreed to give me gas and 25 per cent oxygen.

The govenment then offered without objection the checks of the Magma Copper Company which were marked Government's Exhibits next in order for identification. That is a series of checks representing payments made to Miss Hill by the Magma Copper Company, or at the Magma Copper Company Hospital, by Dr. Swackhammer, M. D.. There are eleven of them in number and they cover a period from September 15, 1930, to March 3, 1931. They were marked as Government's Exhibit G for identification.

(Testimony of Frances Hill)

(Witness continuing): During the time I was in vocational training I was there for a period of approximately seven months I believe. That was with Dr. Cathcart. Dr. Mason was only in training the same as I was. I was paid a subsistence allowance of $100 a month from the government while I was there, just for that seven months.

It was then stipulated by counsel that that was not salary, it was just training allowance to sustain her whole she was in training . . vocational training.

(Witness continuing): When I first came to Los Angeles I brought a patient. I don't know if he went to see Dr. Cohn or not. I didn't come here (Los Angeles), especially to be examined by Dr. Cohn, but I heard so much about him, and I was here, and I was taken ill while I was here, and I was examined by Dr. Cohn. At the time I was first examined by Dr. Cohn he advised me to go back to Arizona at that time. I didn't come to Los Angeles to stay at that time.

REDIRECT EXAMINATION.

When I had this gall bladder operation in 1926 I don't know that there was any difference—about the same, whether I felt better or worse after the operation, than I felt before—about the same. They advised me to have the gall bladder removed—it might help me. You see the trouble in my knee was pretty bad, very bad at that time. The condition in my knees did not clear up after the operation. It has never cleared up. In fact, it is pretty bad during the rainy season. It was very bad. This operation never had much effect on me one way or the other.

(Testimony of Frances Hill)

RECROSS EXAMINATION.

Regarding this operation, removing my gall bladder,—well, it was my general condition. They advised me to have gall bladder removed. Of course I had always had those vomiting spells and indigestion since I had influenza and pneumonia when I was overseas. I had the trouble with my knee at that time, it was very bad. It has been bad at different times, a little better some times, but at different times it has been very bad. It was very bad when I was in Superior. In fact, it was rather difficult for me to go up two steps of the nurses' home at the hospital at that time. Dr. Swackhammer treated me. I have had both my knees X-rayed a number of times since 1918. When I went to the Good Samaritan Hospital it was my intention that they operate and remove my gall bladder and appendix for any trouble I was having in my knees. I had severe stomach trouble, and I still have it. I was not having colitis at that time. I have never had colitis. I had disturbances in my stomach at that time. In my experience as a nurse I have had a gall bladder case and an appendectomy, where they both were removed at the same time. It isn't for me to say what is the customary time that the patient recovers sufficiently to leave the hospital after such an operation—because that is under the doctor's advice always. I have known them to go home a week later on stretchers. I went home in five days on stretchers. I was there a week after the operation. I was there overnight. It would be a week after the operation. I was operated at seven o'clock in the morning, Monday morning, and the next Sunday night after dinner I went home on stretchers, and took my nurse, Miss Todhunter, with me.

(Testimony of Frances Hill)

REDIRECT EXAMINATION.

About this stomach trouble and disturbance of my gastro-intestinal tract, I first had trouble with that on the way home from overseas. After I got out and was discharged it has always bothered me; bothered with indigestion, vomiting spells. Concerning whether it increased or decreased after the gall bladder operation—oh, I don't notice any difference.

At this stage of the trial Plaintiff's Counsel read from Government's Exhibit E for identification, said document being a certified copy of the records of the Adjutant General's Office, War Department, Washington, D. C., pertaining to service and medical records of the plaintiff while in the United States Army and reads as follows:

"I certify that the records on file in the Adjutant General's Office show that Frances Hill executed oath of office as nurse, Army Nurse Corps, March 28, 1918; reported for duty at General Hospital #9, Lakewood, New Jersey, March 30, 1918; transferred April 17, 1918 to Holley Hotel, New York, and assigned to duty with Hospital Unit 'T'; left the United States May 11, 1918, for service overseas; arrived in London, England, May 28, 1918; served with Hospital Unit 'T' at Hursley Park Hospital, England, and at Sarisbury Court, Hants, London, England, to July 18, 1918; transferred in July 1918 to duty with American Red Cross Military Hospital #4, Liverpool, England; left that hospital December 11, 1918, enroute to the United States; arrived in the United States December 26, 1918; reported for duty at Embarkation Hospital #4, New York, December 26, 1918; was forwarded to Nurses' Demobilization Station, Hotel Albert, New York

(Testimony of Frances Hill)

City; was granted leave of absence for 18 days beginning January 17, 1919, and was relieved from active duty upon the expiration of that leave, February 3, 1919, when her service was honorably terminated.

"I further certify that the records show that the above named nurse was treated from April 25 to 27, 1918, at the Office of the Attending Surgeon, Port of Embarkation, Hoboken, New Jersey, for Hyperchlorhydria, in line of duty; November 1 to 12, 1918, at American Red Cross Military Hospital #4, Liverpool, England, for bronchitis, acute, and that she was reported sick in quarters from October 2 to 10, 1918, with influenza, and acute bronchitis. Nothing has been found of record to show that she was given medical treatment or reported absent from duty, other than as set forth herein, during the period of her military service.

"(Signed) E. T. Conley,
"Brigadier General, U. S. Army."

Plaintiff's Counsel read Government Exhibit A for identification which is a certified photostat of the service and medical records of the Adjutant General's Office, War Department, pertaining to the service and medical records of plaintiff and reads as follows:

"Report of physical examination of enlisted man prior to separation from service in United States Army,

"(Surname) Hill . . . . (Christian name) Frances

"(Grade) Reserve Nurse, Army Nurse Corps.

"Declaration of Nurse

(Testimony of Frances Hill)

"Q Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment of, whether or not incurred in the military service?

"A Yes.

"Q If so, describe the disability, stating the nature and location of the wound, injury or disease.

"A Pain in left lung following bronchial pneumonia.

"Q When was the disability incurred?

"A October 1st, 1918.

"Q Where was the disability incurred?

"A A. R. C. Mil. Hos. #4, Liverpool, England.

"I declare that the foregoing questions and my answers thereto have been read over to me and that I fully understand the questions and my replies to them are true in every respect and are correctly recorded.

"(Signed) Frances Hill.
"Reserve Nurse".

It is signed by Frederick M. Hawks, Army Nurse Corps.

"Place . . . . . Hotel Albert.
"Date . . . . . Jan. 13, 1919."

On the following page, which appears to be marked page (2),

"Certificate of Immediate Commanding Officer."

"I certify that:

"Aside from her own statement I do not know, nor have I any reason to believe, that the nurse who made

(Testimony of Frances Hill)

and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.

"The nurse who made and signed the foregoing declaration says she has a pain in left lung, which was incurred about October 1, 1918, at the Military Hospital #4, Liverpool, England.

"The nature and location of the disease are unknown except as stated by the nurse," and it is signed by "A. T. Green, Major, Army Medical Office, January 13, 1919."

On the following page, which appears to be marked page (3), is a

"Certificate of Examining Surgeon".

"I certify that:

"The nurse above has this date been given a careful physical examination, and it is found that

"She is physically and mentally sound.

"The wound, injury, or disease—". That has been stricken out from that sentence.

"In view of occupation, she is no percent disabled."

"(Signed) Wm. A. Clark,
"Major, M. C., U. S. Army."

On the following page is a statement, which appears to be on page (1-A), and states at the top

"(1) Surname . . . Hill, (2) Christian name . . . Frances

(Testimony of Frances Hill)

"(3) Rank, Nurse: (4) Company, Hosp.; (5) Regiment or Staff Corps, Unit 'T'. ANC.: (6) Age, years 26; (7) Race, w. (8) Nativity, Arkansas (9) Service, yrs., 6/12

"(10) Register No. . . . .

"(11) Date of admission, Nov. 1st, 1918.

"(12) Source of admission, Command.

"(13) Cause of admission, Bronchitis acute, Hospital.

"(14) In line of duty? Yes.

"(15) Complication, seq., etc. . . . .

"(16) Disposition, Duty.

"(17) Date of disposition, Nov. 12th, 1918.

"(18) Name of hospital, etc., American Red Cross Military Hospital No. 4, Liverpool.

"(19) Sent with report of S. & W. for month of . . . .

"(Signed) G. M. Lochner, Captain,
"M. C., U. S. Army."

On the last page of this exhibit is

"Space above this line to be left blank,"

And then:

"(26) Days of treatment in current case, current year," and it states the year is 1918. In the column "In hospital", it shows the various months down to the month of November, and it states the month is November. In the column "In hospital", opposite "November", it shows the total number of days in the hospital as "11".

(Testimony of Dr. Julian M. Wolfsohn)

DR. JULIAN M. WOLFSOHN,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified under oath by deposition as follows:

My full name is Dr. Julian Mast Wolfsohn. I am a licensed physician and surgeon, licensed to practice in this state. I graduated from Johns Hopkins School of Medicine and since my graduation from that school I have practiced continuously. My occupation at the present time is consultant in the diagnosis of general diseases, with special reference to nervous and mental diseases. I was in the United States Army during the World War with the rank of Major. During the time I was first in the army I had occasion to make the acquaintance of Miss Frances Hill, the plaintiff in this case. I met her in Liverpool, England. I was chief of the Medical Service and Commanding Officer of the Red Cross Hospital No. 4 at Liverpool, England, and she was one of my nurses. Of my own knowledge I remember that—in about October, 1918, she was taken sick and I took care of her at that time. She was sick about eleven days with the so-called influenza and had bronchial pneumonia at that time. She was in her quarters for about eleven days. She was not in the hospital the first time. I permitted her to leave her quarters and shortly after she was taken quite sick again with the same thing and I sent her to the hospital where she was under my care and she was in the hospital about two weeks with bronchial pneumonia and this so-called influenza. That was the so-called Spanish influenza that was epidemic at that time. "Epidemic" means generally prevalent disease, one that was common at that time.

(Testimony of Dr. Julian M. Wolfsohn)

I recall Miss Hill personally very well. Prior to the time she got sick, like all the nurses she was working and I didn't pay much attention to any of them, just talked to them—she was working all right. She was a very good nurse. There was nothing at all abnormal or unusual about her that I noticed. The conditions under which the nurses were working in October, 1918, just prior to Miss Hill's coming down with the influenza—we had the hospital full of these patients and we were all working over time. I myself worked thirty-six hours without a stop. The influenza epidemic occasioned this. That was true of all the nurses in the hospital. They all worked over time. I didn't see her after her discharge from the hospital. The next time I saw her after that was May 16, 1935, in my office. I examined her at that time. At that time when I examined her I took the history of the interim first. I recalled her at that time. She was a very personable young woman and I remembered her. I took this history of the interim from the time she left the hospital until the time she came to my office. Then I made a mental and physical examination also. I found that the important things were that in her chest, the upper left part of her chest, especially below and over the percussion note was high pitched as compared with the right and that the breath sounds were rather harshened. I also found that the heart was somewhat dilated, the point of maximum impulse was outside of the nipple line with the patient sitting up and systolic murmurs were heard at the apex.

(Testimony of Dr. Julian M. Wolfsohn)

Also her blood pressure was 158 over 96, which is a marked increase. Her pulse rate was rather fast, 82. There was some vasomotor disturbances noted and she had particularly cold hands which were not moist. That is, I should think, the main body of the findings. As a result of that examination my diagnosis was—that she had a chronic pulmonary condition which was the result of the infection which I had treated before, in 1918. Concerning any connection between the condition found from the examination in 1935, and the condition found from the infection in 1918, the brochial trouble in 1918 was in the same part of the chest and the history of the interim gave definite connection between the two. I am familiar with the duties of nurses. Basing my opinion on the condition found in 1935, and concerning the effect upon Miss Hill's health on her following her vocation as a nurse, as to whether or not it would be injurious to her health, I would say that in so far as the breath sounds were harshened and roughened in this area and high pitched percussion notes were noted over this particular area, I believe the local condition not completely healed and any physical labor she might do would be injurious to her health. Concerning her heart condition in that respect, I would not want to pass my opinion. I know there are murmurs there and the heart is dilated, but I couldn't speak as an expert, but generally speaking I would say that it would not do her any good.

(Testimony of Dr. Julian M. Wolfsohn)

CROSS EXAMINATION.

I first treated this girl in 1918 for what was known as Spanish influenza, and bronchial pneumonia. I treated her twice. She had a relapse. I only treated her for the influenza, and bronchial pneumonia at that time. We had over 500 cases in the hospital at the time and I did not go into the matter deeply at that time. Apart from any histories I may have I have no knowledge as to how long her heart condition had existed—only from what I found. The first time any heart disability was found was in 1935 —any abnormality, yes. But it is very common as a sequence to bronchial pneumonia and Spanish influenza, to have myoc*ra*ditis and cardiac conditions resulting therefrom. It is not possible this condition might follow a thyroidectomy. A thyroidectomy is usually done for the relief of this condition rather than to cause it. I noticed in examining Miss Hill that she did have a slight scar on her throat but I believe that was for the relief of her heart condition. At the present time I would not want to venture any medical opinion as to her exact heart condition—except that she had heart murmurs and she has a dilated heart and while it is my belief that her heart is diseased I would not care definitely to venture an opinion. However I definitely believe that it is diseased. I merely cannot say as an expert. I do not know of my own knowledge how long the condition has existed as it is today except from the history and from the fact that I treated her in 1918 and that these cardiac conditions very

often result from Spanish influenza and bronchial pneumonia. Concerning her present bronchial condition—she has a chronic inflamatory condition affecting principally the upper part of her left lung. As to how I would describe this condition in relation to any particular disease, not having made bacteriological examination, I could not say just exactly, not having made any X-ray I couldn't tell exactly how bad or how much or in what way. I could only tell the general pathological condition. I didn't make any sputum tests. I didn't make any X-ray plates. I didn't find any pathological sounds in the right lung, that I could hear. Concerning treatment recommended for the condition of the left lung, we usually treat this condition by more or less complete rest without undue exercise until such time as it completely arrested and then the patient usually does work according to what he or she can do. The treatment I would recommend for Miss Hill would be to take outdoor life, free from physical and mental worries. I do not believe improvement is possible in her present condition after all these years. These pulmonary condition such as this woman has are usually associated with pleurisy—is or has been present, which also accounts for the high pitched percussion notes in the sounds. I didn't examine her lungs through a fluoroscope, just a physical examination. The principal disability I found is confined to the upper part of her left lung. Of course, by the use of X-ray further findings might be made. X-ray is used purely to substantiate the physical examination findings. Medical men do not use X-rays to diagnose cases, but use their hands and ears mostly, and the X-ray to confirm their findings.

(Testimony of Mary Sands Thompson)

REDIRECT EXAMINATION.

My specialty at the present time is diagnosis of general diseases with special reference to nervous and mental diseases. At the present time I am Clinical Professor of the Medical School at Stanford University, Division Medicine—Neuropsychiatry. I am Clinical Professor of that department. Since leaving medical school I have had the following post-graduate work; I spend about four months in Europe each year studying at the medical centers in London, Paris, Berlin, etc.. I have been doing this since 917. In connection with my post-graduate work I have attended the following universities and schools of medicine: The London University, the National Hospital for Paralytic, etc. in London, the Sal Petriere in Paris, and the Petie, Paris, and the University of Montpelier, France.

MARY SANDS THOMPSON,

called as a witness for plaintiff, having been first duly sworn testified under oath by deposition as follows:

I live at 105 West 24th Street, Little Rock, Arkansas. I have been a resident of Little Rock since 1906. I am acquainted with Frances Hill. I became acquainted with her before we went to war, perhaps two months. We were organized here and knew we were going into the same unit together. We met at that time. At the time when we were organized in this unit of nurses at Little Rock, this unit was organized by Dr. Snodgrass of Little Rock. I observed Miss Hill before, during and after her military service. We were required to take a physical examination

upon being formed into a nurse's unit. We were through the Red Cross and were inducted into the military service as a unit. Upon being inducted into the service the nurses were given a very thorough examination. The purpose of it was that all the nurses that did not meet the examination were rejected. I observed the physical condition of Miss Hill at that time. I had the impression that she was a healthy looking person, very healthy and normal looking. She was almost over-plump, had good color, eyes bright and seemed alert. I served overseas with her. We went to Liverpool in July, 1918 and had our first duty there. Prior to that time we were waiting for an assignment. While in Liverpool Miss Hill had the flu, as most of the nurses did have at that time. I was sick myself. I was in London at the nurses' resting home and some of the nurses on account of not having a place for them, were confined to their rooms. That may have been her case. I had occasion to observe her perform her duties prior to leaving England. About October we had that flu epidemic and we didn't leave until about the middle of December. I recall seeing Miss Hill on duty and she complained of feeling bad and she didn't look as if she felt up to par. We left England together I think December 11, 1918. I saw Miss Hill aboard the ship while crossing the ocean. I don't remember very much about her on the way home. We landed at Hoboken, New York, December 26th. I don't believe Miss Hill had to have any special medical attention or anything, she got off just like the rest of us. I don't think she was sent to a hospital because of illness. I don't believe she developed any illness while she remained at that place. I was with her when we left New York, about January 14th. Miss Hill developed an illness

(Testimony of Mary Sands Thompson)

on this journey. We got on the train at night, and the next morning I found Miss Hill still in her berth. I stopped to inquire and found that she was really sick and since there wasn't anyone else doing anything for her I took it upon myself to look after her. I stayed with her the entire trip down—the entire trip she was lying down until we got to Memphis. Her complaints—she had a cough and a pain in her chest and a fever. She was short of breath and in fact she was just a very sick girl. Her color was sallow, deep circles under her eyes, her lips were blue. She wasn't the normal healthy woman she was when she went into the service. She had suffered decidedly from loss of weight. I might add that at Memphis I was impressed that she was so sick that she wasn't able to wait around the station like the rest of us. I knew she wasn't able to sit around and wait for the train so I had the ticket agent transfer her ticket to another train leaving right away. I got a colored boy to help us over to the train. She walked. I helped her get her ticket transferred in order to get her home as soon as possible. We were still in the military service then. I was discharged I believe February 2, 1919. All the nurses had some leave coming to us and we were mustered out of service at the expiration of our leave date. I believe she was discharged about the same time I was. We went in at the same time and got out at the same time. I observed her after that—some two or three weeks later I met her on the street, which was the first time I saw her after we came home. I had inquired as to her condition several times over the telephone but that was the first time I had seen her. She looked as she had before. She had very bad color and

her lips were blue. She had just come from the doctor's office. I was impressed by the seriousness of her condition. There was decided loss of weight. She still had the cough and was raising some mucous or sputum. I went in training in 1906 and graduated in 1909. I have served as nurse almost continuously until 1931. I have attended and have observed tubercular patients. From my observation of Miss Hill just before her discharge from the military service *service* she rather looked as if she was much below par. She moved, acted and walked as if she were tired. I believe I observed that she continually cleared her throat. She had a cough. During the trip home she complained of pain all through her chest and of soreness. She was feverish. She was eating very light. I can't say she seemed to have an upset stomach. She had no appetite. I can't say she appeared nervous or irritable. She was sick—too sick to care much about anything.

CROSS EXAMINATION

The last time I saw her was about three or four weeks after we got home, in 1919. I have not seen her or known about her condition since. I do not know whether she ever has recovered or not. About her illness in the service—I can't recall how sick or anything about her condition because I was sick and wasn't on active duty but being in the hospital I would say she evidently did have some medical attention. On the trip home from New York to Little Rock, I don't recall that she had any medicine at all. I spoke of her being feverish. I didn't really take her temperature—she was hot, flushed and perspired and had all the symptoms of having fever.

(Testimony of Mary Louise Black)

MARY LOUISE BLACK,

called as a witness for plaintiff, having been first duly sworn, testified under oath by deposition as follows:

I am Mrs. M. C. Black, that is my husband's name. Frances Hill is my sister. She is my older sister. Right now I am just keeping house. I am a graduate nurse—that is my profession. I live at 911 S. Main St., Tulsa, Oklahoma. Prior to entering the military service my sister was in Little Rock, Arkansas. She was a nurse also. I was in training at that time. Prior to my sister going into the military service we were living in Little Rock, Arkansas. When my sister went into the military service as an army nurse I was in training for a nurse at that time. Both my sister and I lived in Little Rock prior to her entry into the service. We had been there every day for a year and a half, approximately; and I had been there off and on since she entered training; the two of us had lived there for some year and a half prior to the time she went into the service. Our home was not in Little Rock, it was out in the country. She entered the nurse training prior to the time I did and was a graduate when I entered. She went into the service, to the best I remember, in 1917; in the fall, I think, of 1917. She left Little Rock with Unit T when she entered the service. At that time she seemed to be in perfect health—just full of life and energy. She worked regularly and was athletically inclined. She liked all sorts of sports—dancing, swimming and hiking. She was able to do those things without any trouble prior to her entry into the service—they didn't tire her a bit, she could walk and walk. After my sister left Little

(Testimony of Mary Louise Black)

Rock—when she left with Unit T, I didn't see her until she was discharged—until she came back to Little Rock, about the middle of January, 1919. On her return we lived in the same house; we had a room together. I met her at the train and brought her right out to the house. She was in very poor health when she returned. With reference to her health and physical condition when she returned I observed she was very nervous and irritable and her skin was blue and her lips were blue and she coughed quite a bit and she complained of a pain under her left shoulder and also a pain in her chest, and she ran a temperature—99 to 100 and a little over, and she had pains in her knees— rheumatic pains in her knees, and she was short winded. She couldn't walk a block without having to stop and rest—just gasped for breath. When she returned I put her to bed and then we went down to see Dr. McGill and Dr. Kirby and they examined her. They treated her—they gave her some medicine to relieve her; it was a prescription, I don't know what it was but they gave her some medicine to relieve her. Dr. Kirby treated her all the time she was in Little Rock because she would take cold so easily and she pretty nearly always had a cold, and he treated her for those pains in her shoulder and her knees. She remained in Little Rock around nine months; I don't remember just exactly how long but around that time. During that period she worked just a little bit; she would try to work, but she couldn't because she would give out and she was just so tired and weak.

She was a nurse and the doctors at St. Luke's Hospital favored her with good cases because they knew she needed to work, and she couldn't stand the hard ones; but she

(Testimony of Mary Louise Black)

couldn't hold out any time. Public nursing was rather plentiful in Little Rock during that period; there was plenty of work. She wasn't able to do the work when she got a job and she wouldn't hold out very many hours; she had to have relief. I have relieved her on those jobs and I have also gone out to the hospital around meal time when she would be working to carry trays up and down steps to her patient because she couldn't go up and down steps. I did that frequently. If I—I usually was in the hospital with her when she was working on a case; and if I wasn't, well, I would make it a point to go out there because—when she had to go up and down stairs, it would just—she would have to go to bed. Others helped her and assisted her in carrying on her work, there were two or three of her nurse friends that would do that when they were on duty. Miss Clellan Mason was a nurse, and Miss Georgia Lyle helped her. One particular case of typhoid she had to quit; she had been on it part of two days with Mr. Lee Cazort's wife; she was sick in St. Luke's Hospital with typhoid; she had to give that up, because she couldn't stand it; Dr. Kirby sent her home. Her temperature came up. I know of several cases where she had to get relief and leave the case. I relieved her a couple of times myself. I know she failed Dr. Kirby several times to go on cases by reason of her own condition. That was for some six or nine months after she got back in January. When she came home from the Army she came home in a berth. She was not traveling as a normal person would travel. She had a nurse with her, Miss Mary Sands. She was really brought home in bed. Miss Sands brought her all the way from New York. I met her and she was taken from the train to my home, or my room, in

(Testimony of Mary Louise Black)

a car. When she was off duty at my room she stayed in bed most of the time. She would get up and dress and go through the house—we ate—we boarded—we had sleeping rooms, and she would go out to the dining room for her meals. She did that all the time we were there. Most of her time she spent in bed. I took her temperature on occasions during that period. I was a graduate nurse when she returned. I took her temperature—well, I couldn't say for sure but several times a week. I would take it when I got in. On those occasions I found her temperature from 99 to 100.6. She had a fever most of the time. Regarding her mental condition when she returned home, she was just real nervous and irritable; not like herself. She was very much depressed. Comparing her mental condition at the time she left for the Army with when she returned—well, right opposite, because when she left she was always jolly and liked to go out with people and have a good time, and when she came back she just didn't care whether she saw anybody or not. As to her breathing, I noticed that she was short-winded. She couldn't go up or down stairs without gasping for breath, and she couldn't walk a block without gasping for breath. That condition prevailed at the time she came home, and continued all the time she was there—along at the last part it wasn't quite so bad, but it wasn't much better. She didn't have much appetite. That compared with the appetite she had before she went into the service —well, when she went in she had a good appetite—liked everything. I haven't seen my sister since 1930. The occasion of her leaving Little Rock was that Dr. Kirby thought if she would change climates she might feel better. He thought that she needed a higher altitude for

(Testimony of Mary Louise Black)

her health. He told her to go to El Paso first, and then if she didn't get along all right to go on to New Mexico. She went to El Paso and stayed awhile, then she went on to Tucson. She was in a Government Hospital in New Mexico, I forget the name of it, for quite a while. Then went back to Tucson and then went on to Arizona. I don't know the exact periods of time she stayed at these various places. I have seen her once a year up until 1930. We would always go out to my mother's. The occasions of these visits—well, we just—my brother and I would send her money to come on each spring and summer to see our mother because she is old. We wanted her to come home. We did that up until 1930, up until the time my brother died. My sister was not able to work regularly as a nurse when she returned from the army. I saw her practically every year until 1930. I noticed her condition on those occasions. She was still—her lips were still blue and she still had, up until 1930, a bluish look, and she still coughed a little bit, and she still had the pain under her shoulder blade. Concerning any material recovery of her physical health on any of these occasions so far as I have observed in some ways she could stay up longer, she didn't regain her health or had not regained her health in 1930. The last time I saw her she was home—she stayed in bed pretty nearly a month. She took cold coming out there. That was 1930. She frequently did that. She was in Little Rock after the war and at various times I have seen her. She had a cold pretty near every time she would get home. She was substantially without energy when she got back—no pep at all. She became tired easily. The least little thing would tire her, and that was the general condition rather than the special.

(Testimony of Mary Louise Black)

These colds I spoke of, they weren't just ordinary little colds, they would just hold on. They just seemed like regular old colds. Her cough would always get worse and she would get a fresh cold. I noticed her clearing her throat quite a bit. It was usually when she had a cold. She was going it quite often when she would have a cold. I noticed her voice and the difference between what it was before she went into the service—when she would get real tired, why sometimes she would not speak above a whisper, and her voice was never strong like before she went into the service. She complained of pain in her back, in her left shoulder and one in her chest and trouble with her knees—rheumatic pains in her knees quite badly. That isn't what you would call a pleurisy pain. A pleurisy pain is more down in the side. She had pleurisy quite often but this was in the shoulder blade. It is not exactly a pleurisy pain because it is there constantly, and pleurisy just comes and goes. She would complain of pleurisy pains, she had pleurisy. After she came back the least little cold she would have pleurisy. That was true when she first came back from the army. On several occasions I have strapped her side up with adhesive tape to stop the pain. She complained of such pains at other times when I saw her after she went down to El Paso.

When she was back after that, 1921, we went out to my mother's and I had to tape her up. That is the only time I ever taped her up, but I have heard—she has complained of the pleurisy pains. I took her temperature after she went down to El Paso, when she was back home, sick in bed. She ran around 100 several days. I did not take her temperature on any other accasion. That was along about '21. There was a difference in her weight after

(Testimony of Mary Louise Black)

she returned from what it was at the time she went into the service. She had lost several pounds, though she wasn't skinny, but she had lost. After she returned home —she held about the same I think since about 1921. Her appetite after she came home, well it is a little better now, but it isn't as good as before she enlisted. The last time I saw her she was not quite as nervous and irritable.

CROSS EXAMINATION

The plaintiff is an older sister, she has never been married. She returned from the Army to Little Rock the middle of January, 1919. I don't know the exact date, but it was along about the middle of January. She landed in this country at New York and returned home in a Pullman, She came in a berth. Miss Mary Sands came with her all the way from New York. She wasn't exactly a friend but she was in Unit T with her. They were in the same division together in the Army. Miss Sands was going to Little Rock, she lived there. She came home with my sister—she had to take care of her. She took care of my sister. She nursed her from New York to Little Rock. My sister went to bed after she arrived home. I can't give you the exact time but some little time after she returned from the army she was in bed before she first started to work. It was several weeks. My mother is still living and my father is not living. I have other brothers and sisters living. She doesn't work; she hasn't worked in three or four years. I was just try-

ing to think how long it was since she was in San Fernando Hospital. She hasn't worked since she was in San Fernando Hospital. I haven't seen her since 1930. Prior to that time she was working in Superior I believe . . . nursing in a hospital. As long as she worked in the hospital there, she was making her living there in Superior working in the hospital. She didn't work very long there. I don't know just exactly how long she worked but I know she had to go to Phoenix and go to bed for about a month. The doctor in the hospital sent her home. She just wrote me and told me that.

After she arrived in Little Rock—I don't know just exactly but it was several weeks—she tried to work because I had to pay all the expenses and it was—she didn't like that. After she started to work she couldn't work continuously. I wouldn't say how many days a week she worked because when—she would get lots of calls but she couldn't hold the case for only maybe a day or a day and a half, something like that; she would have to have relief. I have helped her on such occasions. She received the compensation for the work. You see how it was, the doctors gave her the lightest cases because she had nursed for Dr. Kirby before she went in the army and he knew what a hard time it was for her to work anyway, and he would give her as easy a case as he could—make it as

light on her as possible so she could carry on. She had Dr. Kirby—H. H. Kirby and Dr. McGill both of Little Rock when she returned—from the army. Her ailment —when I went with her to Dr. McGill, he made an X-ray, and he said she had an enlarged aorta and a heart murmur, and he said that it was tuberculosis. He and Dr. Kirby examined her together, but Dr. Kirby being a surgeon had left it up to Dr. McGill about the X-rays because that is what he specializes in. When I first saw her in 1930 she had improved just a little bit; she wasn't quite as short winded; she could stay up more; but she was still nervous. She hadn't lost much weight, she was holding her own—pretty good in the weight line then. Her age now, I think she is 46; but I wouldn't say positively because I have forgotten. I think 1930 she was 41 years old. The plaintiff lived with me when she returned from the Army. I do not know with whom she has lived since she left Arkansas.

REDIRECT EXAMINATION

All I know about my sister after she left Little Rock except on her return visits, just when she would come back, is what she wrote me and what she told me. I never saw her either in Texas or Arizona or California or any of those places.

(Testimony of Dr. Albert G. McGill)

DR. ALBERT G. McGILL

called as a witness on behalf of plaintiff, having been first duly sworn, testified under oath by deposition, as follows:

My name is Dr. Albert G. McGill, age 55, physician and surgeon, Little Rock Arkansas. I have practiced in this state 32 years. I graduated from Tulane Medical School, New Orleans, Louisiana in 1906. My specialty is X-ray and laboratory diagnosis and I do some general practice. I am acquainted with the plaintiff Miss Frances Hill. I have known her since the war and before. I knew her at St. Luke's Hospital where she was one of our nurses. Before the war she worked in St. Luke's Hospital as a nurse while I was working with that institution, two or three years. I observed her physical condition as I worked at the same hospital. She was a graduate nurse. Her physical condition when I knew her at that time was good. She was in good health, she was affable, agreeable and efficient as a nurse during that time. She was a successful nurse. I saw her after she returned from the war about January or February, 1919, On that occasion she came back to the hospital and consulted one of our staff members, Dr. Kirby, for the purpose of diagnosis and treatment. I had occasion to examine her at that time. We made a physical examination and the findings were rales of upper lobes of the lungs, a large heart with mitral regurgitation, otherwise known as mitral insufficiency which to an average man is a large and leaky heart. The examination revealed tubercle bacilli, a positive tubercle bacilli existed. We frequently examined hearts. A condition known as paranchynal, mottling and annular shadows—that's X-ray, and it means that there are spots on the lungs silisolid, and annular means produced by tu-

berculosis. Such a condition existed in her case. I made the examination of her chest. I found—that's what we were talking about—that was a chest examination. Her pulse was rapid, she had evening temperature, evening fever, fast pulse, low blood pressure. She had a cough. She had a lack of physical endurance. I made a laboratory examination of her sputum—it was a microscopic examination. It revealed tuberculosis. The presence of tubercular bacilli in the sputum is one of the best signs of active tuberculosis. I would call that active tuberculosis—pulmonary. I did not make any other findings at that time. I don't recall what her blood pressure was at that time. It was low, it has always been low. My diagnosis then, in 1919, of her condition, was pulmonary tuberculosis, active, myocarditis, and mitral regurgitation. My prognosis at that time was bad.

At this stage of the trial the following proceedings took place:

BY MR. GERLACK:

Q. From your finding as to the condition of her heart would you say that it was of permanent or temporary character?

A. Permanent.

MR. FOOKS: If the Court please, I think that invades the province of the jury and I object to the question and move the answer be stricken and the jury instructed to disregard it.

MR. GERLACK: It can not be invading the province of the jury. It is a question as to whether her condition was temporary or permanent.

(Testimony of Dr. Albert G. McGill)

THE COURT: Let me see the deposition.

(The deposition referred to was passed to the Court.)

THE COURT: The question does not ask the doctor as to the matter of disability or as to the matter of capacity to work, but rather whether the heart condition, about which a doctor may be expected to express an opinion, was temporary or otherwise.

MR. FOOKS: I think if the Court please, later on in the deposition of this doctor, you will find that he expresses the opinion that rest and no activity whatsoever were necessary in this case in her condition at that time, and that you will find through that deposition he expresses the opinion that she never could have worked, and her condition was no different in 1936 than it was in 1919 and '21 and '36. I submit, if Your Honor please, it is the ultimate fact to be found here by this jury. It is the issue in the case and it is simply doing something indirectly which the law says you cannot do directly.

THE COURT: Of course it is for this jury to decide the ultimate question, whether this plaintiff became totally and permanently disabled at or before midnight of August 31, 1919. That ultimate question, however, is to be answered upon all the evidence in the case, including opinion evidence to the extent that the jury accepts it, and such opinion evidence I think would include an answer to such a question as to the nature of the heart condition. I think it is a natural question that a doctor might be asked.

In other words, firstly, what is the condition that you find present and next, are the physical findings such as to disclose a temporary defect, or is it the kind of a defect which, in the light of medical experience, lends itself to improvement and elimination?

(Testimony of Dr. Albert G. McGill)

I think that is about all the doctor has done in answering the question.

MR. FOOKS: Of course, if I may interrupt, your Honor, and make another statement; Here is a doctor who is expressing a conclusion without all of the evidence in the case, a conclusion that this condition has been permanent ever since 1919, expressing it in 1936. Furthermore, to my way of thinking, if he would be asked this question as a medical man, is the condition of that kind usually curable or incurable, I think that would be possibly the way that the question should be framed, and then he, as a medical man, is presumed to know, or at least to be able to express an opinion as to whether a condition of that kind is usually expected to be curable or incurable. But when he comes out blankly with a conclusion of this kind, and says, "That is a permanent condition," without any further explanation, I think at most it cannot be regarded as anything but a conclusion, and I do not think the proper foundation has been laid to have the doctor even express such an opinion.

THE COURT: Oh, I think those criticisms go to the weight of his testimony. We might feel that it is not of much worth because of the lack of supporting data furnished by the doctor, but I think that is a matter that, of course, can be developed by cross examination. In the event, for example, the witness of this kind were in the court room. It is true, it is a broad, rather blanket, assertion, but, nevertheless, I think it comes within the boundaries of what a doctor might be asked.

The patient, for example, might come to him for examination, and he might tell the patient comparatively little for one reason or another, not going into details. One

of the questions the patient might ask him is, "Well, this myocarditis and mitral regurgitation that you speak of, is that of a temporary or permanent character?" I think the doctor might express his professional opinion in answer to that question. I think that is really all the import here.

MR. FOOKS: Note an exception.

(Witness continuing) From my finding as to the condition of her heart, I would say that it was of a permanent character. From my examination of her heart, it was damaged to such an extent that her condition would not improve and from which she would not ultimately recover. From my examination of her tubercular condition that existed and whether I would consider it permanent or temporary—well, the heart condition would be considered permanent, however she might get arrest of tuberculosis. I don't remember that I advised her as to her physical condition at that time. She wasn't my patient but I examined her for Dr. Kirby. Advice was probably left to him. However, she was one of our favorite nurses and her case was discussed at a meeting, or maybe more than a meeting, of our Hospital Staff and it was the opinion of all of us that she should go to a higher climate and that she shouldn't attempt to do anything. She was not able to do the work of a nurse at that time. The treatment that was prescribed for her—rest was considered the most important thing for the heart and the tuberculosis too; change of climate and diet for tubercular condition. I made a record of my examination that I made of her at that time. I have not that record now. I do not know where it is. I may have furnished the Veterans Administration with the record of that examination. I gave some of those records to somebody. I don't recall how long

(Testimony of Dr. Albert G. McGill)

Miss Hill was under my care at that time. She must have been around there several weeks. After she left the hospital she went West—it must have been El Paso. I don't recall when she left Little Rock. It was in the same year. I would say she went in the winter or early spring. I do not recall the exact date I examined her in Little Rock after her discharge from the Army—my impression is that it was just a few days. I recall testifying in this case once before. I stated in my former examination that I examined her about the first or second week in February of 1919. I think she attempted to do some nursing at the Hospital in Little Rock after she came back from the war and before going West and she couldn't do it. She was examined and found to be dangerous to have in a Hospital even if she could have worked. I don't think she tried to nurse anywhere else other than at the hospital, and her orders given were not to nurse after her condition was found out.

Then I examined her subsequent to 1919. That examination was made in 1921. She had been away and she returned back to Little Rock from El Paso. When she returned that time I examined her with X-ray and made the physical examination. I found—about what my findings were at the previous examination. Little or no change. I don't remember that I examined her sputum at that time, but I decided that she was still active and one of the ways of determining whether tuberculosis is active or not is the finding of tubercular bacilli in the sputum. I took an X-ray of her chest in 1921. The X-ray revealed about the same as at the first examination. I had occasion to examine Miss Hill subsequent to 1921. That was on January 6, 1936. After my examination of

(Testimony of Dr. Albert G. McGill)

Miss Hill in 1921 I advised further rest and her return to El Paso and further treatment out there for tuberculosis. I advised her to continue the treatment she had been having. She was not able to do any work at that time. In my practice I have had occasion to know the requirements of a job of nursing. She could not do that job in the manner satisfactory to a well qualified nurse. She was qualified by training to do nurse work as required by our hospital. She was not physically fit to do that character of nursing after her return from the war. When I examined her in 1936 I found on that examination—the lungs had moist rales of both upper lobes with consolidated area in both lungs. The heart was very large and there wa*a* a mitral regurgitation. She had a cough, evening rise of temperature, and a sputum containing tubercle bacilli. The pulse was rapid and the blood pressure was low, being 90/70. No improvement in lungs or heart since last examination. From my examination of her at that time I would say that her condition had not improved over her condition at the time I first examined her after her return from the Army. I examined her on three occasions. Her condition had not improved over the previous conditions at former examinations. Her condition from the examination made in 1936 had not advanced in severity from her condition in 1921—they were just about the same. There wasn't much difference. It was just about as severe. The trip out here caused her to have fever. Any exertion caused her to have fever. The mitral murmur was not more pronounced at the time of the last examination than before—but it has always been so pronounced that even a novice could hear it. I took an X-ray of Miss Hill in 1936. I do not have one of the X-rays

made at former examinations. Bearing in mind Miss Hills physical condition as I observed it at the time she went into the Army and my physical examination that I made of her after she came out of the service, in my opinion her tuberculosis began while she was in the Army. In my opinion at the time I saw her in February of 1919 her tuberculosis had existed at that time for a few months. From my association with Miss Hill prior to the time of her entry into the service, she did not complain of any heart disorder. From my examination of her condition after her return from military service, and of my knowldege of her condition before she entered into the service, I would say that her heart condition became serious while she was in the service. With her heart condition such as she suffered, she could not carry on physical activities and work as a nurse. If she tried to work with a condition like she had, the result would be fatal. She was advised by me that if she attempted to work as a nurse it would perhaps be fatal to her or result in the serious impairment of her health—her condition was explained to her so she would understand why it was necessary to take a rest for months and months, years and years, if necessary. She was acquainted with the danger of attempting to work. The effect contemplated work as a nurse or physical activity would have upon her heart condition if she had attempted it—it would make it worse.

Bearing in mind Miss Hill's physical condition and her condition upon my examinations of her, in my opinion the possibilities of Miss Hill being cured of her physical ail-

ments, if ever—the heart diseases were absolutely incurable and on account of these diseases it was very doubtful if the tuberculosis would ever be arrested. I don't think she could ever become cured of her tubercular condition—I didn't think it then and I don't think it now.

CROSS EXAMINATION

Miss Hill worked at St. Luke's Hospital for two or three years before she went into the Army. When she came back from the Army she came back to work at the hospital. I don't know the exact date she came back from the Army—it has been a long time. I have no records now to refresh my memory as to the date. She was discharged in January and I examined her in February. This plaintiff was not my patient at St. Luke's. I didn't handle the patients there, I just did the X-ray work, and microscopic work. She was Dr. Kirby's patient. She was referred to me only for the purpose of having the X-ray and microscopic work done and physical examination done. I specialized in diagnosis, which included physical examination, X-ray and microscopic. Dr. Kirby did surgery. She was Dr. Kirby's patient. I worked there with her for months and months and months. I don't know where the records are that I made at the time. St. Luke's H*so*pital is out of business, has been out of business since Dr. Runyon died about 1934. I was out of the institution from 1919 after I examined Miss Hill, to 1929. Then I did X-ray and laboratory work for two or three years up to the time Dr. Runyon died. I examined Miss Hill three times. I say three times, after this length of time without records, because we examined her just after she got out of the Army and then in 1921 she was

back in Little Rock for a short time and made my office her headquarters while she was here. After she had been back a few days she said she was having a fever. I examined her one time at St. Luke's. I may have been three days examining her, however. It was a very short time which developed from the time she came back to the institution as a nurse and up to the time I examined her—probably a few days, a few days I would say. During the time she was discharged up to the time I examined her she had been around the hospital. I had no supervision of nurses, but I worked with them every day.

In my first examination I said I found rales of the lungs, tubercle bacilli in the sputum and a large heart. I got the impression that she suffered from mitral insufficiency and mitral regurgitation from the big heart. Her heart was so big the valves would not meet. I think the heart was enlarged so that those valves would not close. Possibly the same thing that caused the tuberculosis caused the heart to enlarge, that is, probably the flu she had while in the service. Large hearts, tubercular conditions and valvular diseased hearts come from infections, and the infection she had waa flu. My X-ray showed trouble with the valves of the heart. The X-ray showed a big heart, but those leaks are easily detected by putting the ear up against the chest, or a stethoscope. I made that kind of an examination. I thought I did say something about that in my former testimony. In my former testimony I stated that it was a large heart and that my examination was made by X-ray, that is an X-ray report. Now I state I used a stethoscope—I remember definitely that I did, that is an X-ray report and a large heart is

far as you can go with an X-ray on a heart condition. If one has mitral insufficiency the effort nature makes to overcome it—it makes the heart muscles stronger. When one gets such a leak we put him to bed and keep him there a long time. She had this heart condition from a few weeks to a few months. Whether it would take some considerable length of time for one to have valvular heart trouble to be afflicted with an enlarged heart, as this patient was, would depend on what produced the large heart. If the patient had an infection such as this patient had the heart was probably dilated, in which case the large heart would produce the valvular lesions.

At this stage of the trial the following proceedings took place:

Q. In most instances, Doctor, isn't nature's effort to overcome valvular heart trouble successful? In other words, wouldn't it become compensated?

A. It hasn't become compensated in Miss Hill's case.

Q. That isn't the question I'm asking you, Doctor. In most cases isn't nature's effort to compensate that nature of trouble successful?

A. It is successful in that small percentage of cases in which the heart disease improves.

Q. What does it mean to compensate a heart?

A. It means that the heart get strong enough that it can beat with such terrific force that it can still force the blood through the body even though there is a flowing back or regurgitation of blood with each beat of the heart. Persons who have slight leaks of the heart may get compensation sufficient to lead a fairly active life by being careful not to over-eat or over-exert.

(Testimony of Dr. Albert G. McGill)

Q. Isn't it true that many men or women afflicted by heart trouble such as you found in your first examination of this patient, go on through life and live their allotted time and die of some other disease?

A. No.

Q. That isn't true?

A. No, not with a person with as bad and as big a leak as this person had.

Q. What do you mean by big leak?

A. So much of the blood is flowing back that every beat of the heart couldn't be overcome by compensation, and the lady wasn't able to work.

Q. That's not responsive. The condition that you observed at that time was such, you say, that she couldn't do nursing?

A. That is right.

Q. But nursing is rather a strenuous task?

A. It is.

Q. It requires heavy lifting and loss of sleep?

A. Absolutely.

Q. Are you familiar with any other calling a person of her education could follow without danger to her condition and her heart?

A. No.

Q. This patient, in your conception, has gotten considerably worse since you testified before?

A. No, she is about like she was.

Q. I mean your conception of her condition since you first examined her.

A. I have had from 1919 to 1936—a period of seventeen years. If you have had somebody under observation

(Testimony of Dr. Albert G. McGill)

for seventeen years, and no improvement in heart or lungs, it will be reasonably certain that there will never be.

Q. I'm talking about the first time you examined her. Your conclusion now is, according to your testimony, that she was at that time in a great deal worse condition than you thought at that time she was.

A. Yes, subsequent advance has shown us that her condition is even worse than we thought it was.

Q. You reached that conclusion, yet during this seventeen year period you examined her twice, once in 1921 and once in 1936?

A. Yes.

Q. You say you advised rest for her?

A. Yes, rest is the most important thing.

Q. What did her physician, Dr. Kirby, advise?

A. That was his advice, too. In fact, that was the advice of the whole staff, including Runyon, Kirby, myself, Carruthers and others.

Q. Now, at the time you first examined her you say that she had tubercular bacilli in the sputum?

A. Yes.

Q. You got that by microscopic examination?

A. Yes, that's right.

Q. Does that indicate an active tubercular condition?

A. Yes.

Q. Would you say that a patient would have active tuberculosis when the microscope reveals bacilli independent, or whether or not the patient had fever?

A. No.

Q. Isn't the presence of some fever the symptom of active tuberculosis?

A. It is.

(Testimony of Dr. Albert G. McGill)

Q. Isn't tuberculosis in its incipient stage curable?

A. It is arrestable in many cases. However, that was incurable because of her heart condition.

Q. Now, Doctor, you had not known anything about her condition between 1921 and 1936?

A. Except what she told me.

Q. So far as you know during that period the tuberculosis may have become arrested and the heart compensated?

A. The tuberculosis may have become arrested, in fact it might have been arrested two or three times in that period, but the heart has never been compensated because it's just like it was. The blood pressure is too low for it to be a compensated heart. The blood pressure is so low that the patient could not do anything.

(At this stage of the trial the witness was handed an affidavit dated June 21, 1933, which he identified as having been executed by himself, and he testified further on

CROSS-EXAMINATION

as follows:

That's a report on an X-ray examination of Miss Hill. That's an original affidavit made by me that I introduced before. The purpose of making that affidavit—somebody came to me from the Veterans and wanted it, I don't remember for what purpose. I think it was for the purpose of reflecting her physical condition in January, 1919—her X-ray condition.

I do not know if this affidavit was made for her to use for her own advantage.

I knew at the time the affidavit was given by me to reflect her physical condition as revealed by X-ray at the

(Testimony of Dr. Albert G. McGill)

time I made the examination. My explanation that I didn't mention any tuberculosis in that affidavit—that was concerning her heart condition. As to my saying she was getting the affidavit for her benefit, I don't know about that. As to whether it was to reflect her condition, I had a letter from somebody wanting me to get up records on the condition of her heart. With regard to my explanation of this when I testified before that somebody must have left it out in making a copy, they may have. That affidavit is a copy, that was made in 1933, the original was made in 1919. I made that affidavit June 22, 1933. It was copied from the original. Copied from the record I made at the time I examined her. I did state I didn't know what had become of that record. I had those records in 1933 and my affidavit is copied from them. S. B. McGill of Louisville did the copying. I think those records it was copied from were sent along with it to the Veterans Administration. I think so because after I gave the affidavit I supposed I was through with them and I thought they would use them. I don't know what became of the records. I am sure that affidavit was copied from the records because I sometimes prepare papers like that from old records. I brought my own records from St. Luke's Hospital when I left there. I think this was taken from a record. I don't recall when this affidavit was made nor the purpose of its making. I suppose the reason why they would want a copy of this record reflecting heart trouble and not the tuberculosis was because she was suing for heart trouble. That's the worse trouble she had. I didn't know, as a matter of fact, she was suing for tuberculosis. I haven't seen her complaint. I testified that she had tuberculosis and that she has not recovered

(Testimony of Dr. Albert G. McGill)

from it. I alone didn't advise her in 1921, but the hospital staff. I testified that that is one reason why she couldn't work as a nurse. In making this affidavit I didn't refer to tuberculosis at all because they didn't ask about it. The same record that they copied this from would reflect the trouble of tuberculosis too—it would probably, but on another sheet of paper. In fact, records of her examination such as she got specified fifteen sheets of paper would be used. I state here a mitral murmur was heard and that the X-ray revealed a large heart. That's all I had to say about it at that time. That condition of her heart was so serious that we never expected the patient to get well. I didn't say so in this affidavit. My explanation—that was a report of an X-ray examination. If I were to read this statement as a record of some one I had not examined and it stated a mitral murmur was heard and the X-ray revealed a large heart, I would consider that a condition from which the patient would not recover, or a condition that would not become compensated. My explanation concerning the difference between my extents in this examination and the affidavit I made in 1933, in this deposition we are taking into consideration the patient's whole condition. In that affidavit we were talking about what one sheet showed concerning her heart condition at the time that examination was made. Independent of anything else, my examination of 1936 did not in any way reflect a condition of the plaintiff's heart in 1919, so all my knowledge of this patient's condition in 1919 is based upon the examination I made in 1919. Answering the question if at any time, subsequent to my original examination in 1919, the examination were to show that the heart was compensated, would it mean

(Testimony of Dr. Albert G. McGill)

at the time the examination was made that she was or was not in a curable condition—all heart lesions are serious conditions even though compensated. In so far as activity is concerned, one with a fully compensated heart is not seriously disabled, especially if he knows he has the condition and takes proper care of himself. If he doesn't know he has it he might get mad, excited, frightened, and fall dead. Miss Hill was here in Little Rock in 1921 and I examined her at that time. She was in my office for several days and the temperature she had then I attributed to the travel coming back here, but it persisted. She stayed here several days, and then went back west. She came here to take X-ray training in my laboratory and when she arrived here she came to the office and said she had fever. She went off and rested a few days and came back and said she still had fever. Instead of taking training in the laboratory she stayed around a few days and then she went on back at my advice. She thought and I thought when she came back that she had an arrested case. In fact, she had been told that at El Paso. But one of the ways to tell whether a person's condition is arrested is to let them get out of bed and do a little work. The plaintiff and I were friends before she entered the service and also close friends after her return from the service, to St. Luke's Hospital. Then she came back from El Paso for the purpose of taking X-ray training in my office. I haven't especially been very much interested in her except I was sorry she got a disease as serious as this. From my relationship with her and those things that have been stated here, I took a professional interest in her. I don't know why she came back here in 1936, except to be examined. She was here about four or five days. I

(Testimony of Dr. Albert G. McGill)

don't know where she came from. I don't think I asked her. It may have been a fact she came back here for the purpose of my making the examination to be used in this law suit. I don't know whether she came from Los Angeles or not in order to get an examination by me and use me as a witness in this suit. She gave me the name of a doctor in El Paso and another from somewhere else to whom she asked me to report my findings and that's the only purpose that I know of that she came back to Little Rock.

REDIRECT EXAMINATION.

The plaintiff was under the supervision of the staff of which I was a member while she was in Little Rock at St. Luke's. Her case and condition was discussed by the staff. I was present at those staff meetings. Her flu condition was discussed at the staff meetings. I have testified in this case before. I didn't have available records of the examination at the time I testified before. I had time to go over the testimony I gave before, since it was given—I looked it over a few days ago. The records about which some of this testimony has been given have been submitted to the Veterans Bureau at previous dates. So far as I know many of those records may now be in the Veterans Bureau. Investigators have called upon me relative to my treatment of Miss Hill, I mean Veterans Bureau investigators. In their investigations they indicated that they had records given by me and St. Luke's. The testimony I have given however was based on my actual examination of Miss Hill. I testified I examined her three times. She was under my observation for several days. I examined her with a stethoscope. It is cus-

(Testimony of Dr. A. D. Long)

tomary among doctors to make examinations of this sort and use a stethoscope. My relationship with the plaintiff was professional. I have no interest in the case—none other than to give the record as I see it.

DR. A. D. LONG,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified under oath by deposition as follows:

I have lived in El Paso nearly twenty years. I have a sanitarium here. I am a graduate of the University of Arkansas and specialize in the treatment of diseases of the lungs. I know Frances Hill. She was in my office on and off as stated in my statement—I dont know just exactly when. I made an examination of Frances Hill some time in November, 1920. As near as I can recall, that is when it was and after discussing the case with her, we agreed that it was at that time. I am positive I examined her. The nature of the examination that I made —well, nurses usually go to doctors for just a little examination of their condition and I made an examination of her lungs and heart, but I kept no record of it. I recall what I found—I recall that she had very mild tuberculosis and heart lesion. It would endanger her recovery more, and her chance of recovering her health if she worked or engaged in any kind of strenuous work such as nursing, and it would probably make her heart condition worse to engage in a strenuous exercise.

(Testimony of Dr. A. D. Long)

CROSS EXAMINATION

My diagnosis was a mild form of tuberculosis. The stages of tuberculosis are usually designated as incipient, moderately advanced and far advanced. It is a fact that tuberculosis as a disease may be arrested in numerous cases. In my opinion about 90 per cent of incipient tuberculosis may be arrested, with proper treatment, also a great many cases of moderately advanced. At the time I made examination of the plaintiff in this case, in my opinion she was suffering from the moderately advanced stage of tuberculosis. I recall that she did some work, I do not recall the exact amount or nature. She says she took care of several of my cases, but I do not recall a particular case. I am testifying from my memory but a recent interview with her refreshed my memory. At the time I made my examination I made no written report of my findings. I do not recall when plaintiff left El Paso. I didn't even knew she was gone. She used to come to my office and I didn't know when she left. I had not heard from her. I knew her from one to four months, as near as I can recall.

At this stage of the trial the following proceedings took place:

BY MR. GERLACK:

Q. You stated her heart condition was a permanent condition?

A Yes.

BY MR. FOOKS:

I guess that should go out in view of the direct examination. Of course, he used the word "disability" in the direct examination. On cross examination he used the word "condition."

(Testimony of Dr. A. D. Long)

MR. GERLACK: Well, he is speaking of her heart condition. I think it is proper.

THE COURT: It sounds like the situation we just passed upon. I will let it stand.

MR. GERLACK: Very good. Let it go out.

MR. FOOKS: I understand the court is letting it stand.

MR. GERLACK: Very well.

MR. FOOKS: I would like to note an exception.

WITNESS: (continuing). Strenuous exercise is injurious to such condition. I do not recall the exact nature of the heart ailment. I am not at this time prepared to say that the plaintiff could not carry on any kind of occupation.

REDIRECT EXAMINATION.

At the time I made the examination I would not say that plaintiff could not engage in strenuous work. I advised her. She said she had to do some work, and I told her to be very careful about it and not to engage in strenuous exercise such as climbing stairs. At the time of the examination Miss Hill was suffering from active tuberculosis—that was my opinion. It was not an arrested case. The condition of her lungs would have something to do with her heart condition. It would complicate it—it would be worse than either one would be by itself. It is my understanding that Miss Hill was following her profession as nurse against orders, but she was doing some work.

(Testimony of Dr. W. S. Sharp)

RECROSS EXAMINATION

I did not make an X-ray. I did not test her sputum.

REDIRECT EXAMINATION.

It would not be necessary for a man of my experience to make an X-ray or to test sputum of a patient suffering from tuberculosis in order to form an opinion, but I think one ought to have an X-ray in order to corroborate other information which would make the diagnosis more conclusive, but I am positive Frances Hill was an active tubercular at the time I made my examination.

DR. W. S. SHARP,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified under oath by deposition as follows:

My residence is in Mesa, Arizona and my occupation is surgeon and physician. I graduated from Tulane, University of Louisiana in 1907. I have practiced medicine continuously since graduating and am now actively engaged in the practice of medicine. My office is located at 60 South Macdonald Street, Mesa, County of Maricopa, State of Arizona. I was practicing medicine in 1919 and 1920, at El Paso, Texas, privately and also on the staff of the El Paso and Southwestern Railway Company. I am acquainted with Miss Frances Hill. I met her early in 1919 at El Paso. Her occupation was that of a nurse. I employed her as a nurse on some of my cases. I made a physical examination of Miss Hill during the time of my acquaintance with her and my association with her. That was during the time she was nursing a pneumonia case

for me, for Mr. R. Parker. That was during the early part of 1919. I don't recall just how early, but it seems to me about February or March, 1919. On my examination of Miss Hill at that time I found—well, the occasion of that examination was that I secured Miss Hill to attend this Mr. Ralph Parker, who was a personal friend of mine and while nursing this case Miss Hill had a complete breakdown and I was called to see her at the hospital. I examined her and found that she had an arrested case of tuberculosis, (quiescent). The situation seemed to be that this condition was aggravated by her work and then she also had a heart condition that contributed to her breakdown materially. Mr. Parker was suffering from double pneumonia. Miss Hill was also suffering from heart ailment. She had, as I recall it, myocarditis and a heart condition aortitis, an inflamatory condition of the aorta After I examined Miss Hill I advised her to take an extended rest. She was unable to continue with her work in this particular case. I do not recall whether Miss Hill performed any nursing in El Paso, after that date. She later in the year did some work, just to what extent I am not in a position to say. As I stated, following that, as I recall, she did some work. Explaining this particular case, this young man was a very good friend of mine, the entire family were friends of mine. That is why I recall this case and the severity of this case. That is the case she had the breakdown on—the Parker case. I don't recall any other case Miss Hill was employed on—not any more than this—she was used in some other cases after that. After I found her to be not well I employed her after that because there was a great demand for nurses during that epidemic and we had to use

(Testimony of Dr. W. S. Sharp)

any one we could get to go on a case. I had occasion to examine Miss Hill as to her physical condition after the time of her breakdown that I referred to above—I examined Miss Hill last year, 1935, when she was through here. Miss Hill at that time (1935) was suffering from myocarditis and aortitis and also active tuberculosis of the lungs.

CROSS EXAMINATION

I have specialized in surgery ever since I have been here. My examination of the plaintiff was in 1919. I had an electro-cardiograph. She had myocarditis. It is a diseased condition of the heart muscle which results in weakening of the heart muscles. Defining aortitis—that is usually a resulting condition from myocarditis. It is an inflamatory condition of the aorta valves of the heart and of the lining membrane of the aorta itself. The symptoms which she was found to have with reference to my examination of Miss Hill in 1919, which disclosed these diseases which I have mentioned—well, as I stated before (this is all from memory of the case) I recall she had a general breakdown at that time as a result of her condition, and this other situation that I speak of, I wouldn't attempt to enumerate the symptoms at the time because I have no record of the case available. I don't recall that Miss Hill gave me a history for thyroidectomy. If the facts disclosed in this case that the plaintiff had some two years prior to the time I made my physical examination an thyroidectomy, it is not possible or probable that the heart condition was a result of that operation. In my opinion that previous operation did not have any effect whatever on the heart condition I found in 1919.

(Testimony of Dr. W. S. Sharp)

At this stage of the trial the following proceedings took place:

BY MR. WOOD:

Q. Doctor, assuming that the medical history in this case, as shown by the reports of twenty-seven doctors that examined the plaintiff between 1919 and 1935, in which the heart was shown to be normal and fully compensated, is it not likely that the heart condition you found in 1919, was an aftermath of the thyroid trouble which existed in 1917, and that such evidences were symptoms of the heart trouble that you found, were only temporary in character?

A. I am only stating what I recall I found at that time.

Q. Well, Doctor, assuming the fact which I propounded in the previous question as being true, will you not say that the condition you found was of a temporary character?

A. I don't think so. The reason is, I examined Miss Hill again last year.

Q. Well, Doctor, in answering the question the way you do, are you assuming that Miss Hill had competent physical examination from 1919 to 1935, during the time which you did not see her, and the heart condition was normal and fully compensated?

A. I think that is calling on me to answer a vague situation there. I think the examinations would stand on their own merits.

(Testimony of Dr. W. S. Sharp)

Q. Was the condition which you found in 1935, when you examined her the same as it was in 1919, when you examined her?

A. As I recall, her condition in 1935 was more pronounced; her symptoms were more pronounced.

Q. That is, with reference to the pulmonary conditions and the heart conditions.

A. Yes.

Q. So far as the pulmonary tuberculosis was concerned, I believe you stated it was active in 1935, whereas, in 1919, when you examined her, it was arrested or quiescent?

A. As I recall, it was quiescent in 1919, or had been, I would say.

Q. What effect, Doctor, would the industrial activities of the plaintiff Frances Hill, that is carrying on her occupation, have upon the tuberculosis condition?

A. I would say it would aggravate it.

Q. And what effect would her industrial activity have upon the heart condition?

A. My answer would be the same.

Q. Assuming, Doctor, that after discharge from the Nurses' Corps, plaintiff was engaged as a nurse at St. Luke's Hospital, after which she took nursing assignments on private cases until she entered vocational training in 1921, with the employment objective as an X-ray technician. That between 1922 and 1923, she was registered at a Nurses' Registry, during which period she took assignments regularly as they were offered; that she was

(Testimony of Dr. W. S. Sharp)

engaged as a nurse for a period of approximately seven months from January through July of 1923, in an Indian school at Phoenix, Arizona, where she was required to handle Indian babies, and that she was subjected to a physical examination under Civil Service regulations prior to entrance in this employment; that from November 1924 to March 1925, she resumed her occupation as a nurse with the same Indian School for a second period of employment, and her duties were the same as heretofore described; that for her second period of employment her salary was increased over that received in the prior employment. Assuming these facts, Doctor, would this show that the industrial activities engaged in by the plaintiff, aggravated any lung or heart condition which you found in 1919, or does it not tend to show that the plaintiff's physical condition was improving after your examination?

A. Evidently an improvement. * * *

Q. I understood you to say, Doctor, on direct examination that you employed Miss Hill on other cases, but after the case you had for Mr. Parker, which formed the basis of my question?

A. Yes.

Q. In other words, was it necessary for you to get rid of her on those other cases because she wasn't performing her duties well?

A. As I stated before, Miss Hill was not well, and she was not used regularly. We did use Miss Hill some after

(Testimony of Dr. W. S. Sharp)

that, as I say, there was a shortage of nurses due to the epidemic, and we had to use most anyone that we could get.

Q. Was it ever necessary for you to discharge Miss Hill on the subsequent cases?

A. I don't recall as we did.

(Witness continuing) Having my attention directed to the tuberculosis condition which I found in 1935, when I examined the plaintiff, and using the classification of the American Medical Association for tuberculosis, I will state the stage of Miss Hill's condition at that time—she was an active tubercular. Regarding the degree of activity, she was an active tubercular at that time and also at that time she had an asthmatic condition. In 1919 when I examined her, my recollection was that her tuberculosis had been quiescent.

REDIRECT EXAMINATION

I stated on cross examination that I specialized in surgery, but I was doing general practice in 1919. All through my practice of medicine I have done general practice. I have testified from memory because I don't have the records. They were disposed of when I disposed of my practice in El Paso in 1926, but I do distinctly remember the case of Mr. Parker and Miss Hill, the plaintiff in this action, being employed in that case, and the examination I made of Miss Hill in 1919 and also in 1935.

(Testimony of Dr. W. S. Sharp)

BY MR. GURTLER:

Q. Now Doctor, I want to direct your attention to the long hypothetical question propounded by Mr. Wood on cross examination, with reference to the plaintiff Miss Hill's activities in different parts of the United States, Indian Schools, etc., in which he concludes by asking you if this would not show that the plaintiff's physical condition was improved after your examination. Now, as I recall, your answer to that question was "evidently an improvement." Now, Doctor, when you so answer, is it not true that you must also assume that the question propounded by Mr. Wood gives a complete and detailed history of her physical condition, as well as her industrial activities during the period covered by this question? In other words, assuming also that there were no physical breakdown on the part of the plaintiff during this period?

A. Yes.

RECROSS EXAMINATION

BY MR. WOOD:

Q. Doctor, directing your attention to the last question, as propounded by counsel for the plaintiff, wouldn't the industrial history alone, as outlined in my hypothetical question, which I propounded, indicate an improvement of the condition of Miss Hill in 1919?

A. Yes.

(Testimony of Bertha Case)

BERTHA CASE,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified under oath by deposition as follows:

I reside at 1493 East Roosevelt, Phoenix, Arizona. I have resided in Arizona for twenty-two years. I own and operate the Doctors' Directory. My duties are to take telephone calls for doctors and give out such information as the public may require concerning doctors. I come in contact with registered nurses—I did have the Nurses' Directory in connection with the Doctors' Directory for eight years. I conducted the Nurses' Directory in 1922. From 1921 to 1929—no, part of 1929. I knew Miss Frances Hill. I first met her in 1922. She came in to register as a nurse. You see, there is only one registration and they are on call. After registering with me as a nurse in 1922, she was then on call to render professional services as such nurse when she was able to work. I sent her out on private duty—light cases; short, light cases. Regarding how long she would work at a time—well, if she held a hospital position it would be only a matter of a few months. I couldn't send her to a hospital where heavy work was required. If she was doing private work she might take one or two cases or more, but they were all light short cases, and that gave her a period of rest between times. It would depend whether I would send her out on calls shortly after finishing a job. Sometimes I could, and sometimes it would be a period of several

weeks. Concerning the amount of time she was able to work—I would say to the best of my remembrance it was not more than half of the time. I don't mean she worked six months and rested six months. I mean, it would be just as she could work.

CROSS EXAMINATION

I can't tell you how many times, how many cases she was on in the year 1922. It runs in my mind now that in 1922 she did but very little. I can't tell you how many cases she was on in 1923. I have no record. I have no record of how many cases she was on in 1924. There was a little period that she worked more than she usually did. She worked more probably in between 1924 and 1928. I can't say definitely just what period, but somewhere near that time. She worked a little more than she did when she first came back from the service. Then she was unable to do very much. What little work she did do had been too much for her. Of course that is merely my opinion of the case; she was under the doctor's care and I got reports from the doctors at that time. She lived right near me and I was in close touch with her. My information as to her condition was from the doctors' reports and from seeing her. On the average, from 1921 to 1929 when she was registered with me—well probably during that period she would be half the time working, but some years she would only be working a few months. Some years she would work more than she would other years. The year she was in Hayden, sometimes they would have two or three light cases and then again they wouldn't have anything and she wouldn't

(Testimony of Florence Scales)

have a thing to do. It was rather an unusual condition, but sometimes she had very little to do. That was in Hayden, in 1924—something like that. I wasn't up there with her. The information I got was from some one else. However it is the registrar's job to know what is going on. I had about 100 nurses listed with me or registered with me. During that period I had thirty-five to forty-eight doctors.

FLORENCE SCALES,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified under oath on deposition as follows:

I reside in Scotch Plains, New Jersey. I am a graduate nurse at Bonnie Burns, Scotch Plains, New Jersey. It is a tuberculosis sanitarium. I received my training and graduated at St. Barnabas Hospital, Minneapolis. I am a registered nurse in Minnesota and Arizona. In order to be a registered nurse you have to pass a State Board Examination. In 1922 I was employed as a nurse at St. Luke's Hospital, Phoenix, Arizona. I was on general duty. From 1923 I was head nurse for eight and a half years. The nature of the illness of the patients at this particular institution was tuberculosis. I did nursing with private tubercular patients in 1921. In my nursing course we had courses on tuberculosis. I graduated in 1918. I was at Bonnie Burns Sanitorium three years last August. I knew Frances Hill, a nurse, in 1923. I became acquainted with her by calling her on a private case, from the directory, the Nurses' Directory, in Phoenix. I called for a nurse and she responded to serve as nurse to a

private patient. After that occurrence in 1923 she worked on and off doing nursing in St. Luke's Home up to 1930, doing private nursing, a few days now and again on general duty. I hired her on my own staff to do general duty. The occasion to hire her for general duty for a few days—well, the absence of another nurse through sickness. I observed Miss Hill while she performed her nursing duties at the hospital between the years 1923 and 1930. I had occasion to observe her while she was actively engaged in her nursing duties—while she was on general duty during the time I employed her. I observed about her while she was doing her nursing duties, extreme shortness of breath; coughing; expectorating; easily tired; very easily upset about small things, annoyances; nervousness; no endurance; pains in chest at times; cyanotic; unable to make beds without extreme shortness of breath. Sometimes I observed her socially while she was not on nursing duty during the years 1923 to 1930. I noticed her breath while she wasn't on duty and at leisure. She had shortness of breath, even while resting. She wasn't able to handle a patient in a wheel chair without assistance. I noticed when she tried to do that she was extremely short of breath. That condition would be with her when she had occasion to push a wheel chair with a patient in it. When she had a private patient she would not be able to serve that patient during the regular nursing hours throughout—I gave her a rest hour. I gave her a rest hour because I didn't think she was able to carry the case without it. That rest hour would come generally in the afternoon between two and four. During that rest period she would go to bed. I noticed that she coughed particularly in the morning or on exertion. Her appetite was poor and

(Testimony of Florence Scales)

she complained of indigestion at times. Her voice during that period at times was husky. She would become nervous and irritable at times. The small annoyances that arise in people's lives, she would get very easily upset. She was never hired for steady general nursing. She would request such employment, but she wasn't given such employment for the reason I did not consider she was able to carry it. Whether she was able to carry the duties of a private nurse during this period of 1923 to 1930, well—when we had her she had assistance. Without assistance I do not think she could have been able. We kept her on our list for private patients, because I thought she was deserving it, having been an overseas nurse and that was the only means for her support. When she had to walk any distance she was very short of breath on any exertion. She could not work continuously for a period of several weeks. She wasn't physically able to. Outside of her physical condition she was a competent nurse. She appeared to be willing to work when she was able to. She wasn't the complaining type of person. She was very easily upset and nervous. Insofar as her energy was concerned, it was below par. She complained of pain in the heart region in my presence. Her lips became cyanotic. During the time she was under my observation I don't recall whether or not she lost any weight in so far as I was able to notice. She suffered from frequent colds. Her general color was very pale. I haven't seen her since 1930.

(Testimony of Florence Scales)

CROSS EXAMINATION

I was in contact with Miss Hill from 1923 to 1930. She came to the hospital on special duty—I would say approximately six months out of the year, that is, covering different periods scattered throughout the year —at St. Luke's Home, Phoenix, Arizona. She was what you would term a special night nurse, a nurse on special duty from 1923 to 1930. I couldn't recall exactly what month in 1923—it was quite awhile ago, but I would say in January, 1923. That is when I was head nurse and when I would be calling nurses so I can date it from that. She was alternately on duty as special nurse until I resigned in September, 1930. She averaged about six months in a year. She wasn't a resident of the hospital. When she wasn't on duty there she had quarters down town. These complaints I spoke of, I observed during the time she was under my observation at the hospital. There were six nurses under me. I had to give her assistance sometimes. That was unusual at the hospital. Other nurses did not have assistance at times. I noticed this condition immediately on her coming there, on exertion. That was the beginning of my acquaintance with her in 1923. I didn't come in contact with her at any other place than in Phoenix. I never saw her before I went to Phoenix.

REDIRECT EXAMINATION

Some mention was made that she was a night nurse—she wasn't a night nurse, she was a day nurse. We had 100 patients at the hospital. The six nurses that I spoke of were on general duty, and there were patients who sometimes hired private nurses and in that capacity

(Testimony of Florence Scales)

Miss Hill served. Other nurses didn't have any trouble in handling a wheel chair with a patient in it. No other nurse had any trouble in making a bed. It is an unusual condition for a nurse to have difficulty with these two items. That is one of the reasons why Miss Hill stands out in my mind, and her condition. The other things that she did or was unable to do that an ordinary nurse could do without assistance—well, on the least exertion she was very short of breath. I think that was the most outstanding thing that was absolutely different from other nurses, and because of that, besides not being able to handle a wheel chair and make a bed, she was unable to lift a patient, walk up an incline, even rapid walking; lifting anything heavy. Sometimes I observed her socially during that period of time. The conditions that I spoke of were present during these social times.

RECROSS EXAMINATION

This private duty service applied only to special patients who wanted a private nurse. I do not know her physical condition prior to the time I called her in. I observed her physical condition which I have spoken of, the first case she was on. I continued to call her from 1923 to 1930. When I say that she averaged in my mind in this period about six months of the year—I am putting that approximately. I absolutely couldn't say in 1923 she was employed, because I have no record and nothing to date from. I am doubtful if there are any records of the time that she served there. When nurses are called on special duty they do not come under the hospital. The patients paid the nurses on special duty personally so it really had nothing to do with the hospital. The six months period is an approximate statement—six months out of the year.

(Testimony of Dr. A. J. Wheeler)

DR. A. J. WHEELER,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified on oath by deposition as follows:

My name and address—A. J. Wheeler, Albuquerque Indian Sanatorium. I am a physician and surgeon. I have been licensed to practice as physician and surgeon since 1908 when I graduated from George Washington University. My practice at the present time is confined entirely to tuberculosis. I have specialized in tuberculosis or lung diseases for seventeen years. I know the plaintiff, Frances Hill. I first became acquainted with her about 1923 in Phoenix, Arizona. At that time I was connected with the Phoenix Indian Sanatorium. She was a nurse on my staff. She was employed by me on my staff at the Sanatorium from May, 1923, to July 1923. I examined her lungs during the time she was employed by me. The symptoms which led to my examining her lungs at that time—she felt tired, coughed, had slight expectoration, was nervous, weak, had some pain in her chest, with a slight afternoon temperature. Examination showed moist rales in the upper lobes. My diagnosis as to her physical condition at that time based on my physical examination, was pulmonary tuberculosis. The upper lobes of her lungs were involved with pulmonary tuberculosis. The condition of her tuberculosis at that time—I thought it was active. I do not recall how many examinations I made on Miss Hill during the time she attempted to work for me. Her employment was terminated—I advised her to stop work. My advise to her to stop working was based upon my knowledge of her lung condition. The kind of treatment

(Testimony of Dr. A. J. Wheeler)

it was advisable for a person in her condition to take was—well, rest until the activity and the disease should disappear.

CROSS-EXAMINATION

So far as I remember this woman started to work for me January 1, 1923, and worked until the latter part of July, 1923. She worked continuously throughout this period so far as I remember. Refreshing my recollection from this photostatic copy of an affidavit purported to be signed by me, at that time I made the statement that she worked—well, it doesn't say continuously. The statement would be consistent with the usual government practice of stating continuous service from the beginning to the end of the period, even though there might be temporary absences because of sick leave, annual leave, or leave without pay. This nurse was working directly under me. Her services were satisfactory. She was on duty I should say approximately ten hours a day. If there had been any serious interference with her work because of physical reasons, I would have known it. As a matter of fact, her physical condition would render her unable to perform her duties at any time. I think that was the reason she left. She worked until she got so she couldn't work any more. Her condition wasn't the same in January as it was in July when she left work, at least we weren't aware that she was ill when she started. I recall in the month of May when Miss Hill had an attack of influenza. I do not now recall the details, but I presume it would be the usual inquiry into the history, followed by the usual physical examination of the chest. I don't remember if I made a record of that examination. I don't

recall if I took any X-ray plates. If I did I suppose there would be a record of them, I don't know. If there is on file, it is no doubt in Phoenix. I don't recall. I don't remember if I took a sputum test. My examination was probably a conclusion based on the symptoms which I observed.

Witness was shown an affidavit marked Exhibit A, and he identified it as having been executed by himself on September 19, 1923, and his attention was invited to the last paragraph of said affidavit which was read to the witness as follows:

"As Miss Hill admitted pulmonary activity some months prior, we concluded that she probably had a low grade tuberculosis which had become activated by her attack of influenza."

At this stage of the trial, the following proceedings took place:

BY MR. ESPINOSA:

Doctor, refreshing your recollection from this affidavit, would you say that you made such an examination which convinced you that you could give a positive diagnosis, or would you say from this affidavit that you were merely making a conjecture from the history she gave you, or from the outward symptoms you observed?"

A. We would call it a tentative working diagnosis.

(Testimony of Dr. A. J. Wheeler)

The affidavit executed by the doctor on September 19, 1923, and bearing his signature executed before a notary public designated as Exhibit A, is as follows:

"Phoenix, Arizona
"September 19, 1923.

"TO WHOM IT MAY CONCERN:—

"This is to certify that Miss Frances Hill acted as temporary nurse at the East Farm Sanatorium from January 1 to July 31, 1923.

"During May there were a number of cases diagnosed here as influenza. Miss Hill at that time complained of pains over the long bones and chest, cough and fever. Examination of her lungs seemed to indicate old fibrosis of both upper lobes. At the time we found moisture anteriorly.

"Her temperature did not decline within a few days as our other cases but ran on until July 31st, ranging from 99.4 to 100 in the afternoons, at which time she left the sanatorium. She still complained of pain in the chest, also general weakness.

"As Miss Hill admitted pulmonary activity some months prior we concluded that she probably had a low grade tuberculosis which had become activated by her attack of influenza.

"(Signed) Dr. A. J. Wheeler.

"Subscribed and sworn to before me this 20th day of September, 1923.

"(Signed) E. F. Barrows,
Notary Public."

(Testimony of Dr. A. J. Wheeler)

Do you want the affidavit of employer?

MR. GERLACK: Yes.

MR. SPAULDING (Reading):

"AFFIDAVIT OF EMPLOYER"

- - -

"(To be executed only if claimant worked or tried to work after discharge.

"In the Compensation Claim No. C-339791 of (Miss) Frances Hill personally appeared Dr. A. J. Wheeler of Phoenix, Arizona, who being duly sworn, states:

" 'Said claimant, after her discharge from the service on Feb. 3, 1919, was first employed by me on January 1, 1923, in the capacity of nurse with duties consisting of trained nurse in T. B. sanatorium. $1080.00 per annum, 8 hrs. to 10 hrs. duty.

" 'Claimant continued to work for me until present time. During the period she was in my employ, the claimant worked practically continuously. Employment was terminated on . . not yet terminated, by reason of physical signs in lungs indicate fibrosis both sides in apices.

" 'Miss Hill states she has lost three positions in the last year because of the work proving too much for her. Says she cannot stand night work.

" '(Signed) Dr. A. J. Wheeler.'

"State of Arizona)
) ss.
"County of Maricopa)

"Subscribed and sworn to before this 6th day of April, A. D. 1923.

"(Signed) J. M. B. Brown.

"(Officer Administering oath.)"

(Testimony of Dr. A. J. Wheeler)

MR. FOOKS: I assume you will stipulate, counsel, that that was the government physician making his report to the Interior Department?

MR. GERLACK: Yes. Well, I think this particular affidavit is making his report to the Veterans Bureau. The other letter is making his report to the Chief of the Indian Service.

MR. FOOKS: One of them.

MR. GERLACK: The letter as to the Indian Service and the other as to the Veterans Bureau covering it.

MR. SPAULDING: It states in the corner that this is "United States Veterans Bureau, Medical Division," on the second affidavit.

The first is "United States Indian Service" stationery.

MR. FOOKS: Yes.

I believe the last answer was "We would call it a tentative working diagnosis."

MR. SPAULDING: What page?

MR. FOOKS: Page 5.

MR. SPAULDING: Yes, I have it.

MR. FOOKS: (Continuing)

Q. You stated on your direct examination that you thought the tuberculosis was active at the time of the examination. In most cases it is possible to absolutely ascertain whether a case is active or not active, is that no so?

A. We consider certain symptoms as evidence of activity, such as temperature, weakness, cough and expectoration.

Q. When you make a diagnosis, Doctor, depending upon your knowledge and upon the symptoms you find,

is it not a general thing to make a positive diagnosis, and not make a diagnosis in which you say you think so and so exists?

A. Well, the situation is analogous to legal situations where you have circumstantial evidence. The only direct proof of the tuberculosis is the finding of the tubercle bacillus in the sputum. All of the rest of the evidence is circumstantial and you have to have sufficient weight to establish in your mind a preponderance in favor of tuberculosis; as there are cases occasionally in which you will be wrong.

Q. Do you feel that you submitted this patient to such an examination as would justify you in giving a positive diagnosis of acti*b*e tuberculosis?

A. Why, we thought she had tuberculosis. We couldn't have been sure without finding the tubercle bacillus, but we found enough evidence to make us believe that she had it. That's as far as I can go.

Q. Your statement in this affidavit, that you concluded she probably had a low grade of tuberculosis then, was an opinion by you, based upon your examination, that she had tuberculosis?

A. Yes.

REDIRECT EXAMINATION

At the time Miss Hill worked for me my practice was examination and treatment of people having tuberculosis. The way we examine a person for tuberculosis or to determine their lung condition is to obtain the history of the patient's illness and then make a physical examination of the patient himself. Inasmuch as my previous statement showed that I found moist rales in both upper lobes, I

(Testimony of Dr. D. S. Duncan)

feel sure we actually made a physical examination of the plaintiff. You can't imagine rales—you have to hear them. The method by which you find rales in a person's lungs—you listen to the patient's breath sounds with a stethoscope.

DR. D. S. DUNCAN,

like Dr. Wheeler, was also a doctor in the Government Indian Service. Dr. Duncan's deposition, although taken on behalf of the Government, was called as a witness on behalf of the plaintiff, and having been first duly sworn, under oath, testified by deposition as follows:

I am a physician and surgeon employed by the Indian Sanatorium at Albuquerque. I graduated from the Medical Department of the Texas Christian University, at Fort Worth, Texas. I have engaged in my profession since 1912. I have not specialized in any particular branch. Shown what purports to be a photostatic copy of record of Phoenix Indian School, marked for identification as Defendant's Exhibit 1, and refreshing my memory by looking at that report, I believe that was signed by me. It is my signature. I remember a nurse who was at the Indian School in Arizona in September, 1924, by the name of Frances Hill. I made a routine physical examination of her at that time. I think we had to make a routine physical examination of all employees. This was for the purpose of finding out whether they were entering the service with a disability, and we recorded same. I examined the plaintiff at that time, submitting her to the necessary examination, yes, regular routine examination, which included weight, height and routine chest examina-

(Testimony of Dr. D. S. Duncan)

tion. Upon this examination it is stated, "Had active tuberculosis when discharged from the army, inactive now." I wrote that statement "inactive now." This girl came to work at the Indian School after having worked in the sanatorium with the history and understanding that she had had active tuberculosis, and I employed her because she was a competent nurse and I thought she might be able to do the work even with a disability, even if she had one. The basis of my stating there that her tuberculosis was inactive—partly upon physical examination and partly upon report of the Veterans Bureau—mainly upon the report of the Veterans Bureau. If I remember correctly I believe she brought a statement from the Veterans Bureau of her condition when she left there and when she entered their employment. We hired her knowing her history and knowing that there was a possibility of her having tuberculosis, and on the basis of the report from the Veterans Bureau—Dr. Fred Holmes, who is a tuberculosis specialist, having made same, and being a specialist, could not dispute his word, and in addition, the examination that I made.

CROSS EXAMINATION

I couldn't say definitely when she entered the employment of the Indian School, how long that was after she had left the sanatorium, but it was some time after she left the employ of the sanatorium. I knew her casually, not intimately, while she worked at the sanatorium. I don't know what she did during the period between the time she worked at the sanatorium and the time she started to work for me. I knew she had tuberculosis when at the sanitorium—it was common knowledge that she had been

(Testimony of Dr. D. S. Duncan)

diagnosed tubercular. When she came to me she needed work. Mr. Brown and I talked it over before we hired her. There was some question as to her health, and whether she was able to work, and we took that into consideration but thought that with the help of the Indians and due to the fact that she had only to supervise, she could handle it. Her record was good while employed at the sanatorium and she was a competent nurse. She really wanted to work. I understand she needed the work and being an ex-army nurse we felt we should give her a chance, if she could manage it. I figured the duties were not very strenuous and she could do them, because it was mainly supervision. She stayed at the Indian School under my supervision several months. I couldn't say how long—possibly five or seven months. I don't recall why she left that employment. I don't know whether it was because of appointive civil service position, or what. She didn't run around very much after work. She went to town occasionally. I don't recall during the time she worked for me, whether she had any of the common symptoms of tuberculosis, such as coughing, weakness, and so forth. I do not recall any symptoms. I don't know whether this routine examination was made the day she entered duty, but evidently it was made a short time after entrance on duty. On the routine examination which was made when in my employment I made no special lung examination—no microscopic, no X-ray—but routine chest examination. On the examination report it shows that under the heading "Abnormal Bronchial Sounds—PELA". The letters "PELA" mean prolonged expiration left anterior. That means a slightly abnormal

condition. It would probably mean the scar tissue from tuberculosis. The healed scar tissue is not necessarily active. If you have activity, you have rales over the area, you have inflamation in your lungs, but just simple prolonged expiration does not mean activity. There might be activity with prolonged expiration. Activity is based on several things besides prolonged expiration and rales. Tuberculosis is a treacherous disease. If a person has had tuberculosis, even though it has quieted down, that does not mean that the person does not have tuberculosis any longer, and if a person has had active pulmonary tuberculosis the tubercular bacilli may lie dormant or be carried to any other part of the body so that the condition might be aroused by any sustained exertion. I don't remember having made any other examination except the routine examination I have testified about. I would not have recalled that I made any examination had I not been shown the purported record. The points I remember about Miss Hill or her condition, was the question of employment at the time and trips made to the Veterans Bureau. Whether that would indicate there was some considerable doubt in my mind as to whether she was physically able to undertake the work—that part never concerned me as Mr. Brown did the hiring and firing and the Veterans Bureau was handling her case so I was a disinterested party. Not being a tuberculosis specialist I had to be governed by the opinions and reports of the Veterans Bureau men. I did not make a definite diagnosis myself as to whether or not her tuberculosis was active at that time. My diagnosis was based partly on the physical find-

(Testimony of Dr. D. S. Duncan)

ings and mainly on reports from the Veterans Bureau. Her tuberculosis might have been active during the time she was employed by me.

REDIRECT EXAMINATION.

It was my duty to pass on the health of an employee when the superintendent sent him to me to be given this examination that was called a routine examination. When Miss Hill came to me I knew her history and knew she had had tuberculosis—we knew that all the time. We were placed on notice that tuberculosis might be active—we considered that at all times. While not a specialist I do have common knowledge of tuberculosis and chest diseases. I gave her an examination which according to the answer I gave Mr. Brown showed prolonged expiration left anterior. I answered Mr. Brown that that indicated scar tissue. Prolonged expiration does not mean anything as far as activity or inactivity is concerned, and is a condition in the lung which has caused thick or hardening of the tissue and scar tissue that changes the sound upon expiration. I don't remember—after this examination, if I made a report to the superintendent as to her health and that she was able to work—we must have talked it over to have employed her. I examined her—all employees coming in are examined to indicate condition at the time of employment. I made that report to my superior—reported the findings. If I remember correctly this patient came to us for employment and claimed to be inactive and the Veterans Bureau had pronounced her inactive and my physical examination as far as I went did not show activity so I based my findings on that.

(Testimony of Dr. Harry Cohn)

RECROSS EXAMINATION

Q. Doctor, since nurses were so hard to get at that time, isn't it a fact that you were not very anxious to find this girl had activity, knowing she was competent?

A. We felt sorry for this girl.

Q. Are you a member of the National Tuberculosis Association, Doctor?

A. No.

DR. HARRY COHN,

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

I am a licensed physician and surgeon, licensed to practice as such in this state. I graduated from the University of Denver Medical School in 1907. I have practiced medicine continuously since that time. My specialty is diseases of the chest. That includes the disease of tuberculosis. At the present time I am director of Tuberculosis Division of the Los Angeles City Health Department. Concerning my experience in public health service prior to that, I was with United States Veterans Bureau, United States Public Health Service in Los Angeles County, Cook County, Illinois; Milwaukee County, Wisconsin. In the United States Veterans Bureau I was medical director and medical officer in charge of Camp Kearny Hospital and medical director of the hospital at Fort Bayard, New Mexico. The hospital at Camp Kearny was devoted exclusively to the treatment of tuberculosis. The hospital at Fort Bayard, New Mexico, the same. For a year and a half I was commanding officer at Camp Kearny. I had occasion to examine Miss Hill, the plaintiff in this case. I first

(Testimony of Dr. Harry Cohn)

examined her in December, 1929. She came to the office stating that she was taken ill on her way from Phoenix; came in for an examination. I examined her at that time. She consulted me merely as a physician for treatment. Upon my examination I found at that time she was suffering from an active tuberculosis. She also had evidence of heart damage; she had a pleurisy at the base of the left lung. Her tuberculosis at that time was classified as moderately advanced. Lung tuberculosis is generally classified three ways: as a minimal, or early; moderately advanced and advanced. Her case was moderately advanced. Concerning her heart condition she had evidence of a widening of the large tube which leads the blood from the heart, and an enlargement of the heart, and the inability of the heart muscle itself to respond in a satisfactory way to any sort of exercise or effort. Her condition indicated a serious heart condition. Her condition of tuberculosis was serious at the time I examined her in 1929. I examined her again in April, 1935, last year, after this suit was filed here. When I examined her in 1935—at that time she had an active tuberculosis involving the upper lobe, which was approximately the upper third of the left lung. She had, of course, the same pleurisy that was noted previously and she had approximately the same heart condition, although it appeared to be somewhat worse at that time. I examined her again the latter part of 1935. In October, I believe. The condition of her health then—well, her lung tuberculosis had quieted down somewhat. In other words, the findings which indicated an active tuberculosis on other examinations were not present at that time, so the disease was marked "quiescent."

(Testimony of Dr. Harry Cohn)

Her heart condition and her inability to respond to exercise was present at that time as it had been on all examinations. I don't recall the date I next saw her, but I have seen her several times *tis* year. Her condition at the present time—I believe the tuberculosis is quiescent. That is, it is not definitely active. It is one of those border line. That does not mean she is cured. Explaining the disease of tuberculosis and how the disease affects the patient—of course the disease of tuberculosis represents the growth usual in a lung tissue of these tubercle bacilli. They grow in very microscopic mounds. That is, the germs. They ordinarily grow in very microscopic mounds where nature is trying to wall them in. The disease usually spreads by the escape of some of these germs from one of these little tubercles into the adjoining lung tissue, and so gradually spreads. The patient becomes sick because of the poisons which are elaborated by these germs in their growth, and find their way into the blood stream and produce symptoms. Tuberculosis, like every other chronic disease, has its periods of activity and periods of remission. It is not a continual—ordinarily continual progressive disease. Most chronic diseases show these periods of remission, as does tuberculosis. Briefly, the thing that causes some people to have tuberculosis and other people not to have tuberculosis, we will say both living under the same conditions—the racial factor is a very important factor; the economic scale is a very important factor, and the housing is important; poverty is probably a very important contributing factor. Some people have relative immunity; other people have none. The type of germ has very much to do with it. Some germs in tuberculosis

are very much more poisonous than others. The condition of the patient's health at the time he receives the infection is a vital factor in determining whether or not tuberculosis is going to develop. So in any given case so many factors operate. Concerning a person who exposes himself to persons who also have tuberculosis,—naturally tuberculosis is spread from one individual to another. That infection usually takes place by the sick person coughing and the individual who is exposed inhaling some of that coughed-up material. These germs are passed on from one individual to another. The contact is usually direct—it may be indirect—for instance, a child may play on the ground and may get on his fingers some tubercle bacilli, or on a plaything; but the common way is by direct exposure. It frequently happens that a nurse working in a tubercular ward acquired the germs. There is no cure for tuberculosis in the ordinary sense of a specific remedy for the treatment of tuberculosis. The treatment of tuberculosis is more or less a mode of living. A man who becomes sick from tuberculosis is taken out of industry and placed ordinarily in a santorium where he may have rest and freedom from worry, where he may have financial assistance and proper food and good housing, then he gets such medical and nursing care and perhaps surgical attention as his particular condition requires. In no disease is individual attention so important as it is in tuberculosis. Therefore it is probably better, generally speaking, to place people in a sanatorium than to attempt to treat them in the home. Concerning the effect of physical exercise or working at an occupation in connection with the disease of tuberculosis—well, it

ordinarily accelerates the progress of tuberculosis for this reason: that the man who has tuberculosis carries a double burden. He carries on the normal activities which are required for life, and he tries to fight an infection, so that he burns up his tissues much more rapidly than normally, and he tends to lose weight, has a rapid pulse and fever. When he rests, generally speaking, his temperature goes down; his pulse decreases; his appetite improves; and he gains in weight. If he exercises, of course, the contrary happens and his disease is ordinarily accelerated. Generally speaking, working makes a person worse. In Miss Hill's case, the significance her heart condition has so far as tuberculosis is concerned—and vice versa—well, her heart condition has this particular effect upon her lung condition: the circulation, of course, in a heart which is not an adequate pump, is not so good as it would be in a pump that is competent. The tendency is for the blood to collect in the dependent portions of the lung and produce some congestion there. On the other hand, her tuberculosis, with a production of poisons, does injure the heart just as it injures other parts of the body, so that there is produced a more or less vicious circle, one acting to the detriment of the other. In other words, having this heart condition, she would have much less of a chance to make progress in a tubercular condition than if she didn't have a heart condition. The reverse of that is true so far as the heart condition is concerned, that it is aggravated by the tubercular condition. Her lung ventilation is rather handicapped by her lung condition. In other words, there is that shortness of breath in a pair of lungs which should be resting. I examined her for

(Testimony of Dr. Harry Cohn)

thyroid trouble. I did not find any. I found simply a scar where she had some operation on her neck.

Q. Now doctor I want to state this: Mr. Fooks said he would stipulate at the beginning of this trial, that in view of the fact that Dr. Cohn had heard all of the testimony at the two former trials, he would permit him to assume that he had heard the abstract of the evidence in this case.

MR. FOOKS: I think that is correct. I cannot recall any particular additional evidence. I think the doctor is fully familiar with the facts of the case. I am willing to waive the usual hypothetical question to save time.

(Witness continuing): I am familiar with the evidence in this case. Assuming that the evidence that I am familiar with in this case is substantially correct, and basing my opinion on the findings, and the physical examination in this case, but not taking into consideration the diagnosis or conclusions of other doctors, in my opinion Miss Hill's tubercular condition began or started or had its inception following shortly after the attack of flu and pneumonia while in service. I believe it has been testified to that this was in October and November, 1918, in Liverpool, England. Bearing in mind those facts that it was testified Miss Hill was discharged from the army on February 3, and returned to her home at Little Rock, Arkansas around January 20, 1919; that at that time she was examined by Dr. McGill and found to have a positive sputum with X-ray of the lungs showing infiltration and other definite evidence of tuberculosis; that she also had

a mitral regurgitation—damage to the mitral valves of the heart. Assuming those facts and the other facts that I am familiar with in this case, in my opinion the degree of advancement of her tuberculosis at the time she came home from the army and was examined by Dr. McGill, and he found positive sputum, which means sputum is stained with a dye and put under a microscope, and the presence of tubercular bacilli is shown up through the glass, that is positive sputum, and that is one of the definitely unquestionable evidences of tuberculosis—assuming that she had that positive sputum and the X-ray showed definite infiltration in various parts of the lung, and also she was complaining of pleurisy pains in the lower part of the lung. Assuming those findings in connection with the hospitalization and the trouble she had had with the flu and bronchial pneumonia in France, I would say that the degree of advancement in the tuberculosis in the spring of 1919, particularly on or before February 3, 1919, was moderately advanced.

If she was moderately advanced, and assuming those facts of the findings to be true,—and assuming that I am entitled to take into consideration the subsequent history and present condition from my own examinations—looking back on the case in retrospect, the chances or probabilities of her being cured or completely arrested of tuberculosis in 1919, February 3, even had she taken the best of care and gone to a sanatorium and done everything possible—it is my opinion from those facts, that it would not be good. I mean by that, that the probabilities were very much against her becoming a case of arrested tuberculosis even if she had taken the best of care.

(Testimony of Dr. Harry Cohn)

At the present time I do not think there is a reasonable probability of her getting over this tuberculosis and becoming what is known as an arrested case. Concerning the fibroid type of tuberculosis which has been testified to in various findings that these doctors on examination found—nature is attempting to throw up scar tissue and wall off this tuberculosis. In other words, there are two types of tuberculosis: the soft spreading type, and the type that scars up as it goes along. We may have a tubercle here and scar tissue—tubercle forming here (indicating) and an extension along the other side and more scar tissue forming. That is what they call a fibroid type of tuberculosis. I believe from the history of this case as shown by the evidence in the court room here, that the tuberculosis was incipient or beginning in the fall of 1918 after she had the bronchial pneumonia, and by February, 1919, it had become moderately advanced. Concerning the test you put a person through to ascertain and determine whether or not they have attained a case of arrested tuberculosis, where it has previously been active—the patient should have no symptoms referable to their disease. They should have no tubercle bacilli in their sputum. You take X-ray films, and the X-ray films should show that the spots are at least stationary or healing and the patient should demonstrate the ability to take a prescribed amount of exercise daily over a specified period of time. The first examination I made of Miss Hill, I found tubercle bacilli in the sputum. I have not been able to find it since then. It does not mean a man does not have tuberculosis just because there was no tubercle bacilli in the sputum. If there are tubercle

bacilli in the sputum, it means there is an ulceration somewhere discharging tubercle bacilli in the bronchial tubes. A man may have extensive tuberculosis without tubercle bacilli in the sputum. If you find positive sputum, you do not have to go further. I examined her heart—I had measured her heart. I have listened to it with a stethoscope. I have had her take bending exercises and straightening up exercises, testing the heart response, taking her pulse rate before and after, and after rest, and have taken her blood pressure on many occasions. So far as the measurements are concerned, her heart is not normal in size. In that respect I found the left side of the heart, that is that portion of the heart which pumps the blood into this large blood vessel supplying the entire body, called the aorta, is enlarged. That is what we call an enlargement of the left ventricle. Now, the aorta, this tube (indicating on chart) is also wider than normal, and that is the aortitis. Her heart, that is, the measurement across this way (indicating on chart) the transverse measurement, is approximately an inch larger than normal. The last time I examined her heart was today. I used a steel measuring stick in order to be able to see it under the X-ray. I had her in front of the fluroscope. When a person is in front of a fluoroscope it is possible to see the action of the heart and aorta. You visualize the action of the heart in front of the fluroscope. In other words, you see the heart beat and pump. There is nothing abnormal with her heart as I observed it except the rate of the heart is much faster than the normal rate. In other words, the normal rate for a woman of her age is approximately 78 to 82, while her heart rate is always above 94.

(Testimony of Dr. Harry Cohn)

The rhythm, instead of being a normal rhythm, is inclined to be irregular. Her pulsations are not normal. The significance that that has in connection with heart disease —well, it shows there is some damage to the heart muscle. In other words the heart muscle, instead of being truly muscular tissue, is in part scar tissue. Basing my opinion upon the evidence in this case, not taking into consideration the diagnosis or conclusions of other doctors, in my opinion she was suffering from a serious and incurable ailment for which rest was the prescribed treatment, and which would have been aggravated by work of any kind, at the time of her discharge February 3, 1919. That disease was a degenerative heart disease and she was suffering from a moderately advanced lung tuberculosis; chronic pleurisy.

CROSS EXAMINATION

The first time I saw her was in 1929. At that time she had a fibroid type of tuberculosis. That is known as a low-grade infection. The fibroid type is the chronic type of tuberculosis. As to the likelihood of a cure or arrestment, it is not correct that the fibroid type of tuberculosis is more easily arrested than some other types. That is essentially the chronic type of tuberculosis. The other type destroys people before it develops promiscuously, generally speaking. That is miliary tuberculosis—either that or the type that goes on to the cavities for formation. The patient ordinarily don't live over that period of years; they succumb. Miss Hill must have had a cavity once upon a time in order to throw up tubercle bacilli in the sputum. Where they have a positive sputum there is always a cavitation. You can't throw tubercle bacilli into

the bronchus without having a hole leading into the bronchus. Both of her lungs were affected the first time I examined her—the upper portion of both lungs, the disease being more extensive in the left lung than the right. That involved more than the apices. While the right—it was just approximately in the apices, in the left it involved the greater portion of the upper lobe. The left had more involvement than the right. I was talking about activity, not involvement. The involvement stays there, just as her pleurisy always stays there. I mean, the pleural thickening is always there, but the activity is the thing that varies. I have made quite a few sputum tests. I am required to report an active case of tuberculosis to the State, but I am not required to report the sputums every time a sputum is examined. I did report to the State that her condition was active. The law requires me to only report it once. Each physician, when he examines a case of tuberculosis and finds it is active, is required under the law to report it. He doesn't report it every time he examines it; that is not the law. I made the report first in 1929. I have not made any report since. At this time it is quiescent. The law does not require me to make a report to the State when I find an active case of tuberculosis has become quiescent.

I made X-rays, I do not have them with me. Concerning how long it took me to make these examinations—well, the average length of time consumed in the examination is approximately one hour; it took me approximately that time in making my examination in 1929; probably a little more. In 1935—I say, they approximate each one an hour; within a few minutes, one way or

(Testimony of Dr. Harry Cohn)

the other. In 1935 I did not make my examination solely for the purpose of qualifying myself as a witness in this case; partly for it. The examination made in '36 was chiefly for that purpose. The only examination I ever made of this patient, except for purposes of qualifying myself as a witness was made in 1929.

It is possible to arrest tuberculosis. In the case of an arrestment of tuberculosis in its incipient stage, I do not expect, after the proper tests have been made to determine that the tuberculosis is definitely arrested, a reactivation of it; approximately 90 per cent of tuberculosis in its incipient stage remain well after arrestment occurs. In arresting tuberculosis in the moderately advanced stages, approximately 60 to 70 per cent we expect to stay arrested after the proper tests have been made. If a patient were shown to be arrested for a period of six or seven years, during which period of time they took reasonable exercise, and in some instances engaged in strenuous exercise, and there was no reactivation of that disease within a period of six or seven years, I would be justified in believing that that tuberculosis had become definitely arrested. As a matter of fact a period of even three years I would be justified in believing that that case of tuberculosis had become definitely arrested—less time than that. Six months is the average time. If it is properly classified six months is the ordinary accepted time. Two years is usually classified as apparently cured. That is, according to the records of the National Tuberculosis Association, if the person is living under normal conditions. In the case of a major operation of a patient—concerning whether or not I would recommend a general anaesthetic be given

to a patient of mine who is suffering from a severe heart or lung condition—That is difficult to answer because it is again an individual problem. You have to know your patient. I just simply can't answer that categorically. It is true in all well-conducted hospitals all operative patients are examined for the purpose of determining the condition of the lungs and their heart before administering a general anaesthetic. Heart and lungs are always examined before operations. It is generally accepted medically that where there does exist—speaking now generally—a severe chest condition in either the heart or lungs that they do not administer a general anaesthetic other than under conditions, we'll say, of most extreme emergencies.

Regarding this damage to the heart that I found in 1929, which condition still exists, and whether her heart condition was easily detected—all you have to do is to take one glance at it under the fluoroscope and know that it is a badly damaged heart. Suppose I had not the advantage of a fluoroscope—that I just made a stethescopic examination—and whether or not I would say it was easily detected—well, that is again a question of the time you picked the heart up. There are probably some times when the heart is relatively quiet and other times when the heart would be quite stormy. That would depend upon the time the doctor put the stethescope on the heart.

At the times I examined Miss Hill without the aid of the fluoroscope or an X-ray—one or the other—and concerning enlargement of the heart and damage to the heart, and whether that might be termed easily detected. Yes, sir, you can tell that her heart is enlarged by simply

(Testimony of Dr. Harry Cohn)

looking at the apex beat hitting the wall. It is out of the normal wall. Yes, sir, without the aid of a fluoroscope or an X-ray. I say, just by looking at it when she is stripped for examination you can tell. I mean by looking at her chest. After all, the heart beats normally will not hit in this fifth interspace an inch and a half outside of the external border, and if you look at it and find it an inch over here (indicating) to the left where it normally hits, you know there is something wrong with it. It is up to you to determine what is wrong with it. There are limits to a normal variation, and that is an abnormal variation. Most types of heart disease are progressive. That is, when you are talking about this chronic type of heart disease, they are progressive.

As it refers to her heart I have expressed the opinion that I believe that Miss Hill had such damage to her heart and also to her lungs on February 3, 1919, that she was then unable to take any activity—that is, exercise—without damage to her heart. Comparing her condition now to 1919 as it refers to her heart—I think it is very much worse today than it was in 1919. There is an entirely different condition than there was in 1919. There are only two valves involved now. The aorta and the mitral. Mitral regurgitation is simply a leaking heart, the valve does not close properly. The aorta valve, of course, is the same situation—that does not close properly.

Assuming that Miss Hill worked for a period of six years as a nurse on call from the registry the greater part of that time, and also during that period of six *months* was employed in three different institutions, the longest period for six or seven months, and the other period about

four months, that she followed her profession as a nurse doing night duty and day duty as required, that she during that period of time worked approximately one-half of the time—and when I say "one-half of the time" I do not mean that she was working six months and off six months, but averaged about one-half of the time—and assuming that between the years 1924 and 1928—the latter part of this period between '24 and '28 she worked more than half of the time in order to average up the whole period to a half—and assuming the way I found her in 1929 and since that time—I still believe that her heart having withstood such exercise was damaged to such an extent at that time—1919—that she would be unable to follow any activity or take any exercise without injury to her heart.

Considering the condition that I found her in—the involvement of the two valves at this time—she is now absolutely incurable so far as her heart condition goes. By "incurable" I mean by that that there has been a permanent damage done. There is not a possibility of having that permanent damage remain stationary. The process will continue. There will be more scar tissue forming in her heart muscles, more scar tissue forming in the heart valves. There is certainly going to be impairment of the circulation in her heart muscle, which will be progressive. The thing does not stand still. When I say "the thing does not stand still" I mean the progress does not stand still—it does progress. That type of heart disease will progress. The condition in which I found her in 1929, 1935 and 1936 has progressed slowly—that is characteristic of that type of heart disease. The work

that she did do undoubtedly aggravated the progress of the disease. Supposing she had not done anything during that period of time, just lived under the advice of a competent physician at the bed of the rest room, not taken any exercise at all other than under the competent physician's orders I do not think that the condition would have progressed to the point it has today. It would have increased over the condition she had in 1919. It would have been less marked—in other words, the expectancy of life would be greater under continued rest than it has been under her mode of living. If I were given a different set of facts, or some other facts were added to the facts that were given to me by Mr. Gerlack at the last two trials, I would not change my opinion as to the progress of this heart condition, except that I know her heart was definitely damaged in 1921, and if other statements were made between 1921 and the present time, it wouldn't change my opinion because the heart was permanently damaged in 1921, and there isn't anything further to damage the heart except what has already happened, so it wouldn't change my opinion as to the amount of damage she has.

At this stage of the trial the following proceedings took place:

BY MR. FOOKS:

Q Now, you have concluded, Doctor, definitely that the heart was definitely damaged in 1919, and you did not see her until 1929. What are you basing that opinion upon?

A Basing it upon the medical records.

(Testimony of Dr. Harry Cohn)

Q What medical records?

A Which were read in evidence.

MR. GERLACK: That were read in evidence at the last trial?

THE WITNESS: Yes, sir.

MR. GERLACK: You are referring, Doctor, to the official records?

THE WITNESS: The depositions.

BY MR. FOOKS:

Q Well, now, Doctor, I will refer you particularly to the records that were read in evidence at the last trial and which, at this time, is Government's Exhibit F for identification.

THE CLERK: That has not been introduced in this case.

MR. FOOKS: Well, anyway, I will amend my statement. It is the medical records that were read in evidence before.

MR. GERLACK: I have no objection if you want to make them the same number at this time.

MR. FOOKS: I will offer them at this time as Defendant's Exhibit next in order.

THE COURT: The next exhibit in order will be H for identification.

(The documents referred to were marked "Government's Exhibit H" for identification)

BY MR. FOOKS:

Q Now, we find, Doctor, the first examination was made on December 19, 1919. I shall not read to you the diagnosis: I will merely read you the findings.

(Testimony of Dr. Harry Cohn)

(The excerpts from reports of physical examinations comprising Defendant's Exhibit H for identification were read to the witness as follows:

December 19, 1919. Dullness, decreased breath sounds left lower lobe, friction rub same area.

April 7, 1920. Physical examination reveals roughening over larger bronchi.

May 13, 1920. Roughening over larger bronchi.

June 7, 1920. Lungs: Shape of thorax, full; weight, loss of, when, amount—has lost no weight; chest measurements, inspiration 38 inches, expiration 35 inches.

Location of normal percussion note—Am unable to detect any pathological condition in chest.

Ausculation, location of abnormal sounds—Am unable to detect any pathological condition in chest, except roughening over larger bronchi.

Rate of Respiration—Respiration 26.

Haemoptysis: None. No valvular lesion detected.

An X-ray report dated June 29, 1920. Lungs: Hilus shadows rather heavy and contain large number of calcified glands. Apparently some scar tissue, scattered throughout right side.

Conclusions: Markings not typically tuberculous. After careful consideration of all physical findings in this case, the writer feels that diagnosis of tuberculosis should have been given previously.

August 4, 1920. Physical examination revealed extremely well-developed and nourished. Chest full and

expansion good. Some slight roughening on the larger bronchi, otherwise chest negative.

August 22, 1920. Physical examination: Looks well, well-nourished and developed, no chest deformities, expansion appears good and equal on both sides.

Palpation: Slight decreased tactile fremitus both lowers.

Percussion: Decreased resonance above second rib and third dorsal spine both sides, also both bases.

Auscultation: Increased vocal resonance above third rib and fourth dorsal spine right, and above third rib and third dorsal spine left. Broncho vesicular breathing above second rib and third dorsal spine both sides. Diminished breath sounds at both bases. No rales heard.

September 3, 1920. Physical examination: Plaintiff well-developed and nourished; chest full and expansion good. Evidence of hyperplastic pleuritis, left base, with some post-influenza rales, which may possibly be tuberculosis. Fibrosis right lobe, upper, especially posteriorly. In view of report of X-ray findings, we have hesitated to give this plaintiff a diagnosis of tuberculosis though the present examiner feels sure that this should have been done long ago.

October 21, 1920. In hospital from August 22, 1920 until October 21, 1920. Plaintiff was discharged and the certificate of discharge is as follows: "This is to certify that Miss Frances Hill, now a patient in this hospital, is an arrested case of pulmonary tuberculosis, and physically able to accept vocational training."

(Testimony of Dr. Harry Cohn)

Physical examination: Inspection: Chest broad and well-nourished. No depressions.

Mobility: No lagging, expansion equal.

Palpation: Tactile fremitus increased on right, not more than normal.

Percussion: Right impaired resonance below fifth dorsal and below third rib in mid-axillary line. Left. Impaired resonance above second rib and third dorsal.

Auscultation: Diminished breath sounds base with slight friction rub, mid-axillary line. No rales.

Left. Diminished breath sounds at base. No rales.

November 6, 1920. Physical examination: Inspection reveals plaintiff robust, well-developed and nourished.

Palpation and percussion negative.

Auscultation reveals broncho-vesicular breathing at right apex and increased vocal resonance about fourth rib and fifth dorsal spine right lung. A few clicks upper lobes, each lung. No rales in either lung. X-ray report by Dr. Cathcart is as follows: 'Lungs—Hilus shadows rather heavy and contain large a number of calcified glands. Apparently some scar tissue scattered throughout right side. Conclusions: Markings not typically tuberculous.' Roughened breathing over larger bronchi.

August 23, 1921. Chest examination: Chest full, deep and broad.

Mobility: Good.

Palpation: Fremitus: Negative.

Percussion: Right lung. Negative; left lung, negative.

(Testimony of Dr. Harry Cohn)

Auscultation: Right lung: Slight increase in voice and breath sounds at apex; bronchi-vesicular breathing same place. No rales before or after cough.

Left lung: Posteriorly just above the scapula there is a small area of granular breathing.

January 10, 1922. Physical examination: Well nourished. Temperature 98.3. Pulse 80.

Heart and Abdomen: Negative.

Weight 144 pounds.

Chest: Well formed

Palpation: Fremitus: Negative.

Percussion: Right lung: slightly impaired resonance apex to 2nd rib.

Left lung: Normal.

Auscultation: Right lung: Marked broncho-vesicular breathing and exaggerated voice at apex; no rales before or after cough.

Left lung: Normal.

Mobility: Expansion about equal and symmetrical.

July 5, 1922. Special tuberculosis report: Height, with shoes, 5 feet 3-1/2 inches. Weight (without coat) 140.

Sputum positive or negative? If negative, how many sputum specimens were examined? Has never had a positive sputum.

Shape of chest: Symmetrical.

Mobility: Good.

Palpation: Fremitus: Normal.

(Testimony of Dr. Harry Cohn)

Percussion: right lung good resonance left lung good resonance.

Auscultation: Right lung negative Left lung slight inspiratory roughening in left base posteriorly.

Summary: Roughened pleura in left base posteriorly.

February 15, 1923. Physical examination: Well-developed and very well nourished young woman. Color good. Eyes, ears, nose and throat negative. Heart not enlarged, regular, no murmurs. Abdomen, negative.

Special tuberculosis report: Time of day, 3:30 P. M., pulse, 72; weight, (without coat) 147.

Chest: Well shaped.

Mobility: Normal.

Palpation: Fremitus: Normal.

Percussion: Right lung slight decrease second rib and third dorsal spine. Left lung, slight decrease at apex.

Auscultation: Right lung broncho-vesicular breathing and increased whisper second rib and third dorsal spine. No rales before or after cough. Left lung prolonged expiration over hilus near sternum and at apex. No rales before or after cough.

Slight old infiltration both apices, most marked on the right without evidence of activity.

July 26, 1923. Well developed and fairly well-nourished young woman. Apparently not ill. Eyes, ears, nose and throat, negative. Heart, not enlarged, regular, no murmurs.

(Testimony of Dr. Harry Cohn)

Abdomen: Negative with the following notation made by the examining physician: "This patient complained of a rise in temperature in the middle of the morning. As I always found her normal when I saw her in the afternoon I made an appointment with her for 9:30 a. m. for several mornings, but she never returned."

Tuberculosis Report: Temperature 98.2 degrees. Pulse 72. Time of examination: 4:15 P. M. Height, with shoes, 62-1/2 inches. Weight, (without coat) 145.

Shape of chest: Broad, well shaped.

Mobility: Normal.

Palpation: Fremitus: Normal.

Percussion: Right lung: Decreased second rib and third dorsal spine. Left lung: Decreased second rib and third dorsal spine.

Auscultation: Right lung: Broncho-vesicular breathing and increased whisper second rib and third dorsal spine. No rales before or after cough. Left lung, increased whisper over hilum. No rales before or after cough.

Summary: Slight amount of infiltration both apices without evidence of activity.

August 27, 1923. Chest examination: Weight, (without coat) 147.

Shape of chest: Full.

Mobility: Normal.

Palpation: Fremitus.

Percussion: Right lung normal. Left lung normal.

(Testimony of Dr. Harry Cohn)

Auscultation: Right lung normal. Left lung breath sounds slightly distant.

Summary: Infiltration in hilus of both lungs as shown by X-ray. Left pleura slightly thickened.

October 23, 1923. Physical examination revealed a very well developed and nourished young woman. Scar of thyroidectomy. No symptoms of hyperthyroidism. No pathology found.

Additional Remarks: "If this patient ever had pulmonary tuberculosis, it has left no positive signs.

"Chest examination: Apices slightly hazy. Heart and diaphragm shadows normal. Hila shadows enlarged with moderate bilateral infiltration. Both lower and upper bronchial trees are thickened. Small cavity described in previous report in upper left lobe not visible in this examination. X-ray conclusions: Possible perihilar tuberculosis."

Temperature, 98. Pulse, 80. Time of examination 11:00 A. M. and 3:00 P. M. Height, with shoes, 62-1/2 inches. Weight (without coat) 145.

Examination of chest: Shape, normal.

Mobility: Normal.

Palpation: Fremitus, normal.

Percussion: Right lung normal; left lung normal.

Auscultation: Right lung normal; left lung normal.

February 27, 1924. Physical examination: Looks well, well-developed and nourished. Color good. Weight, 151 pounds. Temperature, 37 c; Skin and mucous membrane, negative; Vascular system, negative. Osseous system:

(Testimony of Dr. Harry Cohn)

Negative; Pulse, 92; Heart, negative; Abdomen, negative; Nervous system, Negative; Muscles and joints, Negative; Auscultation: Right lung: Broncho-vesicular breathing (slight) over apex posteriorly. Few atypical crepitations this area. Left lung: Breath sounds apparently normal. No rales. Pleural crepitations at base.

X-ray report with a summary of findings: No parenchymal infiltration either lung.

X-ray of chest: February 28, 1924. Films good. Bones negative. Right diaphragm smooth: Costo-phrenic angle clear. Left diaphragm hazy; costo-phrenic angle not shown on film. Trachea and heart negative. Hila increased in density with caseous and calicified nodules. The upper lobe bronchi both right and left are slightly heavier than normal; their borders are studded. Linear markings cannot be traced to the surface. The right mainstem bronchus shows some connected tissue change.

Summary: Fibrosis both upper lobes.

August 19, 1926. X-ray Report: Bony thorax is normal. The right apex is hazy, the left clear. There is much peribronchial thickening, together with several scattered calcified glands. The right lung presents a hazy appearance throughout. The left lung shows a few striated lines in the upper lobe. The heart is slightly enlarged in its transverse diameter. The right diaphragm is smooth and the left is adherent at the center of its dome.

April 24, 1927. Physical findings: General: Expression one of discontent; skin sallow. Head and Neck: Eyes react normally to light and accommodation. Tongue

slightly furred; nose, throat, tonsils and teeth normal condition. No glandular adenopathy. No thyroid enlargement.

Chest: Normal; heart normal position; apex beat in the fifth interspace; heart sounds are normal. Lungs show moderate amount of fibrosis on X-ray. No abnormal sounds in lungs. No rales.

Abdomen: Tenderness under right costal margin with some muscle rigidity of right rectus. Tenderness over lower portion of right rectus, especially marked on deep pressure.

Neuro-muscular: Normal.

Cholecystogram shows retention of dye in gall bladder after thirty-six hours. Appendix not visualized. Tenderness in right iliac region on fluoroscopic examination. X-ray diagnosis was chronic cholecystitis and chronic appendix.

Anesthetic begun 7:45 a. m.; operation begun, 7:55 a. m.; operation completed 8:55 a. m.; anesthetic—used nitrous oxide, so-called "laughing gas", and ether to start, and then turned over to ether. A quarter of a pound of ether was used. The gall bladder and appendix were removed through a four inch incision into upper portion of right rectus, under local and gas anesthesia. It was necessary to use almost every type of anesthetic to anesthetize the patient. Appendix, adherent, post cecal, sclerotic at distal three-fourths.

Technique incision made: Gall bladder enlarged, sacculated at lower portion. Gall bladder thickened; large amount of fat subperitoneal. Liver showed moderate

amount of sclerosis radiating from gall bladder. Other abdominal organs are negative.

Immediate post-operative condition: Good.

Post-operative diagnosis: Good.

Pathologist's report: Appendix walls sclerotic; distal lumen obliterated; microscopic sections show chronic exudate on the surface, and marked fibrosis of the walls.

Chronic appendicitis.

Gall bladder: Not normal size; walls not thickened. Microscopic sections show a moderate degree of fibrosis of the walls with atrophy of the mucosa. No recent inflammatory changes.

Operated April 25, drainage clips removed May 1st; wound healing; general condition good; satisfactory convalescence.

Physical examination April 24, 1927. Temperature, 98.4; Pulse 88. Respiration 20. Patient admitted to hospital; assigned to room. Patient up and around.

Monday, April 25, day of operation. 6:20 A. M. Temperature, 98; Pulse, 84.

6:30 A. M. M. S. grain, 1/6; scopolamine (morphine) 1/200 grain.

7:30 A. M. Removed to surgery.

9:15 A. M. Returned from surgery. Pulse 88.

9:30 A. M. Proctoctysis

10:30 A. M. M. S. grain, 1/6 (H); Pulse 80; sleeping.

12:00 Noon Sleeping.

1:00 P. M. Patient turned to right side.

(Testimony of Dr. Harry Cohn)

1:10 P. M. Vomited (about oz.)

1:30 P. M. Lips greenish cast.

2:40 P. M. Sleeping.

3:00 P. M. Vomited.

4:00 P. M. Temperature, 98; Pulse, 88.8; Respiration, 22; vomited. Sodium bicarbonate administered.

4:20 P. M. Vomited. Patient turned to left side.

Tuesday, April 26, 1927: Sleeping.

11:30 A. M. Visited by attending physician.

3:30 P. M. Complains of difficult breathing and pain in right shoulder.

3:45 P. M. Hot sodium bicarbonate administered.

April 30, 1927—8:00 A. M. Dressing changed by attending physician; drainage and four sutures removed.

4:00 P. M. Temperature, 99; Pulse, 92.

6:00 P. M. Discharged from the hospital upon the representation of plaintiff that she felt well enough to go home. Physician notes—plaintiff had made a very satisfactory recovery.

February 13, 1931. X-ray report of the heart. Findings: Diameter of the chest 31 cm.

Greatest transverse diameter of heart—14 cm.

Transverse diameter of aortic arch—6 cm.

The heart outline suggests possibly a slight left ventricle enlargement, but the heart measurements are well within

the normal limits. Bony framework negative. Diaphragms rather high in the middle portion of each. Heart and great blood vessel shadow within normal limit as to shape, size and position for this type of chest. The hilus shadows are somewhat enlarged and thickened showing several isolated caseous or calcified nodules. There is a very slight degree of fibrotic mottling extending out into the upper lobes, being heaviest with a slight degree of beading in the right upper. There is possibly a slight degree of peribronchial thickening toward the apex, being heaviest in the right.

February 17, 1931. Special tuberculosis examination: "Opinion—The undersigned Board of three medical officers have carefully reviewed the file of the above captioned. In accordance with the provisions of Regulation 215, it is our opinion that:

"1. The claimant has suffered active tuberculosis.

"2. Tuberculosis has reached complete arrest.

"3. Tuberculosis was completely arrested 10-31-23".

March 26, 1931. X-ray Report. The greatest transverse diameter of the heart is 13-1/2 centimeters. Transverse diameter of the costo-sternal articulation 6 centimeters. Transverse diameter of the chest is 29 centimeters.

Conclusion: "The diameter of this heart is within normal limits".

(Testimony of Dr. Harry Cohn)

After the above excerpts from defendant's Exhibit H for identification, consisting of reports of physical examination made by Government physicians from 1919 to and including 1931, together with the report of physical examination made on April 24, 1927, by a private physician showing findings made and the progress of plaintiff's recovery, after her operation for the removal of the appendix and gall bladder in 1927, the witness was propounded a question on cross examination as follows:

BY MR. FOOKS:

Now, assuming those facts, together with the other facts given you, would that change your opinion that Miss Hill had a condition of the lungs and heart on February 3, 1919, which was then incurable and which would not respond to treatment, nor could not be alleviated from its then condition?

THE WITNESS: No, it does not change my opinion.

Q It does not change your opinion?

THE WITNESS: No, sir.

REDIRECT EXAMINATION

Concerning Mr. Fooks asking me about the work Miss Hill did, and what effect in my opinion the work in the Indian School had on her tubercular condition, well, the work in the Indian School would simply aggravate her condition. The Veterans Bureau gave her a certificate that she was completely arrested just before she took the job at the Indian School, and they gave her the job at the Indian School based on the Veteran's certificate that she was arrested.

(Testimony of Dr. Harry Cohn)

At this stage the following proceeding took place:

THE COURT: Just a minute. Are you omitting the fact that the doctor who testified to giving her that job said he relied both upon the certificate issued by the Veterans Bureau and his own examination? Is not that what he testified?

The point is: I am calling attention to the fact, as you put it to the doctor, that you have omitted the circumstances that the doctor who accepted this certificate from the Veterans Bureau was also the same doctor who reported he had examined her before he gave her employment.

MR. GERLACK: Yes, I think so. And on cross examination he testified that he had relied largely upon that certificate.

Q. Dr. Cohn, you will recall the evidence of Dr. Duncan and also Dr. Wheeler—Dr. Wheeler in the Indian Sanatorium, and Dr. Duncan at the Indian School—that both of them found active tuberculosis while she was working in that Government service. What effect did the work she did—in your opinion, what effect did the work that she did do in the Indian School and also the Indian Sanatorium have on her tuberculosis in regard to making it break out and become active again?

MR. FOOKS: I object to the question upon the ground that I have a notation taken by the Government's own witness to the effect that they found enough evidence to believe she had tuberculosis. That is as far as the doctor would go. That is exactly the way the doctor answered the question. He called it "a tentative working diagnosis." He was asked if he ever made an examina-

tion which would convince him that he could give a positive diagnosis, but he found evidence to the effect that he believed she had tuberculosis. That is as far as he would go.

BY MR. GERLACK: Q. I will amend my question, accepting counsel's version of that.

A. It only proves this: that her work apparently reactivated her tuberculosis.

If a person has a case of arrested tuberculosis, they would not be showing symptoms of tuberculosis. The word "arrested" implies that the patient is symptom free—that means that they have no symptoms. Concerning the symptoms of active tuberculosis that the patient himself would feel, in the first place, I will just give them now briefly—the undue sense of fatigue. In other words a man on the job may find himself tiring more easily than ordinarily; he may cough; he may expectorate; he may have pains in his chest; and of course he may occasionally spit blood. Those are the chief symptoms which the patient himself appreciates. About 40 per cent of the patients spit blood in tuberculosis. Mr. Fooks asked me if it were possible to arrest tubercoulosis in the beginning stage, and I believe I said it was. That is true only in 90 per cent of the cases. The other ten per cent ordinarily advance into the moderately advanced or far advanced classification, and become chronic types of tuberculosis or succumb. If Miss Hill had attained a case of arrested tuberculosis—if the word "arrested" is used,—she must be symptom-free. Then the presence of any symptoms attributed to tuberculosis indicates she is not arrested. If Miss Hill had a cough or recurrent cold, if properly at-

tributed to tuberculosis, it would indicate she was not arrested. Tuberculosis is, generally speaking, a progressive disease, and the stages are incipient, which means the beginning, and sometimes spoken of as minimal; and then goes on to the moderately advanced; and from moderately advanced it goes on to far advanced; and from far advanced it goes on to a terminal case or death. It never goes backward, meaning you never change the classification of moderately advanced to incipient. Getting back to the gall bladder operation that counsel read to me, there is nothing in that record of that operation that counsel read to me, that is remarkable from a medical standpoint—just an ordinary report on an ordinary successful operation. Fibroid type of tuberculosis means that there was destruction of lung tissue itself and replacement by scar tissue. The fact that there was considerable scar tissue and considerable destruction of lungs by the progress of the tuberculosis, would not have any significance in connection with using an extra amount or different kinds of anaethesia to put a person to sleep. There is nothing unusual about giving a person with tuberculosis a general anaesthetic—it is done daily. It is done in far advanced cases. It is done to some extent for a pleura-plastic operation, although the use of local anaesthetic is gaining in vogue, in favor.

RECROSS EXAMINATION

Tuberculosis is a serious disease. So, I just stated before on cross examination I always take a history of a patient as a general procedure. Taking the history of a patient, if they related to me they had night sweats, loss of appetite, loss of weight, felt feverish and in the after-

noon, they didn't sleep well, and all of the other different symptoms that usually accompany the disease of tuberculosis, without going further, I wouldn't diagnose tuberculosis on the symptoms alone—no, I wouldn't diagnose it. Supposing they were coming to the hospital for treatment, and without the diagnosis for tuberculosis—I would examine them before I would give them a diagnosis. If I were the physician who admitted the patient to the hospital—and they have such physicians—and it was customary while I was in the Government service when they admitted a patient who came there to be treated for tuberculosis, sent by some officer of the Veterans Bureau, to send them first to the Out-Patient Service, or to some physician who may admit them, as a rule they were sent there by the Veterans Bureau, some officer, and they were usually sent there for the purpose of hospitalization, we had a great many patients in the hospital at Camp Kearny while I was in charge, ordinarily around five hundred,—before I would hospitalize that man I would give him a thorough examination; we placed them all in the receiving ward and kept them in the receiving ward until the examinations were completed except in emergency cases. I ordinarily took a week. If they related symptoms of tuberculosis and I could not find definite evidence of tuberculosis I did not discharge him right away but kept him there for observation. I did not give him the benefit of the doubt. We tried to find out what was causing the symptoms.

It wasn't a question of doubt. A man might come in with these symptoms, and it might be due entirely to a different type of infection. If the diagnostic procedures

were all negative, if I did not find in the receiving ward definite evidence of tuberculosis from such examinations as they made, but they did show some signs of it—and there were subjective symptoms that they gave me, and it was evident that they had tuberculosis—I did not keep them there longer for further observation. A man comes into a hospital and gives a variety of symptoms such as would lead one to believe he had tuberculosis. If our sputum examinations, our tuberculin tests, our X-ray tests are negative, we say the man has no tuberculosis. After all, a man may have some motive. All those tests were given in the receiving wards excepting in emergency, because he might come in with some infectuous disease other than tuberculosis. He might have had smallpox in the incubation period. He might have had flu, diphtheria, so we kept him in isolation on the receiving ward until the diagnosis was made, excepting a man who was acutely ill. As to whether we did not have definite regulations to follow that we could not at that time discharge a man where we believed, or had any reason to believe, that he still had tuberculosis, we could discharge a patient who had tuberculosis on their request; and we could discharge patients without their request, as far as I recall, it was not a penal institution. As to whether if we had any reason to believe that they had tuberculosis it is a fact that we had to keep them there until we could definitely diagnose that they did not have tuberculosis, or that it was arrested, we kept them there until they requested their discharge; that is correct. So, in that way we gave them the benefit of the doubt, that is, to that extent.

Over a period of 17 or 18 years, I have probably examined one hundred thousand cases of tuberculosis, and

(Testimony of Dr. Harry Cohn)

as a professional man I would hesitate a long while before attempting to make a definite diagnosis of any particular individual of tuberculosis 16 years ago, without some record of an examination showing tuberculosis at that time.

I would permit a patient of mine, other than under extreme emergency, to be given a quarter of a pound of ether, who was suffering from active moderately advanced tuberculosis—we do it quite frequently. They stand anesthetics very well. That is good medical practice. Of course the danger with the tubercular patient, like it is with the otherwise healthy man, is due to the chance of developing pneumonia, but the tubercular patient is in no more danger of developing pneumonia after an ether operation, than is a so-called healthy man. As to whether I would permit unless it was under an extreme urgency a patient of mine who had a myocarditis and an aortitis in such degree that they never would get better—incurable, plus a moderately advanced active tuberculosis, to be given a quarter of a pound of ether and other anaesthetics—I would after a proper consultation. That is a subject for the anesthetist to decide. If the anesthetist feels it is safe and the surgeon feels it is safe, I see no valid objection to it after proper protection of the patient. After all, ether is a heart stimulant, not a heart depressant. I would answer this same question from my own personal knowledge of institutional practice that that would also be good medical practice. That has been done and is being done.

I mean that after all there is no objection to giving a patient with tuberculosis an ether anaesthetic; nor is there

any particular objection to giving a patient with myocarditis, provided at the time the heart is fairly well compensated, because ether is a heart stimulant. Concerning some serious condition that presents itself in the case a patient suffering from myocarditis and aortitis, including an enlargement of the heart, suffering also from moderately advanced active tuberculosis, and whether a patient suffering from those conditions is any different, so far as having administered to such a patient a general anaesthetic—than a normally healthy patient, there is no difference, provided this: That the blood pressure is within fairly normal limits, and that there is no evidence of serious kidney damage.

I mean this: That after all, the patient who goes into a hospital for gall bladder operation has been under observation for considerable time before she goes into a hospital. Ordinarily, they are. They are carefully examined; the urine is examined; the blood is examined; there may be chemical examination of the blood. The heart, of course, is examined, and the patient may have an active tuberculosis. Ordinarily they don't take cases in the hospital with such active tuberculosis, except in the case of an operation, and an examination is made. If the surgeon is satisfied the patient is a good surgical risk, the operation is done, even though in the presence of heart disease, aortitis and lung tuberculosis.

If, on the other hand, other conditions are present which are the result of these, then the operator may use a local anaesthetic. That depends, of course, upon the surgeon and the anaesthetist. Some give a preference to local anesthetics, and some use general. At the present time

the tendency is giving local anesthetics more than the general.

At this stage of the trial, the following proceedings took place:

THE COURT: What I am trying to get clear, Doctor, is: I gathered in the early part of your testimony that this patient by 1919 was suffering from a serious heart condition and from a serious tuberculosis condition. Now, here in the spring of 1927 she is being subjected to something other than just a minor, trivial operation. Is that not right?

THE WITNESS: Yes, that is a major operation.

THE COURT: Do you not call that a major operation?

THE WITNESS: That is a major operation.

THE COURT: So that is something serious?

THE WITNESS: Yes.

THE COURT: Now, does the Doctor draw any preliminary distinction as to the preliminary examination that he will make in determining whether such an operation will be performed, and if so, under a general anesthetic, when he has a normal, healthy patient as distinguished from the patient who is suffering from a serious heart condition and an advanced or moderately advanced pulmonary tuberculosis?

THE WITNESS: Yes. He does ordinarily make a distinction.

THE COURT: So, now, then, that is because you have an abnormal condition as distinguished from what confronts the doctor when he has a healthy patient?

(Testimony of Dr. Harry Cohn)

THE WITNESS: Yes, sir.

THE COURT: That is true, is it not?

THE WITNESS: Yes, Your Honor; yes, Your Honor.

THE COURT: Now, did you see anything extraordinary about the facts that are stated, apparently in one of these depositions, that this lady is operated on the morning of April 26th, and the doctor authorized her discharge from the hospital on the afternoon of April 30th?

THE WITNESS: Yes, she went home extremely early; but I don't know what her after-care was when she left the hospital. Perhaps she was receiving the same type of care she would have in the hospital. I am not able to answer that question. Of course, it is early to discharge patients from a hospital, and the reason for that has been given.

THE COURT: What I have in mind is, nursing is ordinarily regarded as strenuous work.

THE WITNESS: Yes, it is hard work.

THE COURT: And it is the kind that is both nerve-exhausting and physically exhausting?

THE WITNESS: Yes; the general run of nursing is that type, Your Honor.

THE COURT: Am I correct that one of the reports that was read to you this afternoon indicated that this lady was admitted to the hospital at Fort Bayard in August of 1920—the Government hospital—and was discharged from that same hospital in October of 1920, the report disclosing findings to the effect that this lady was an arrested case and in fit physical condition to take up vocational training?

(Testimony of Dr. Harry Cohn)

THE WITNESS: That was the statement made in October, I believe. I think she went into the hospital in April.

MR. FOOKS: August.

THE WITNESS (Continuing) August. She went in the hospital in August; went out in October, which is, of course, a short period of time and does not fit the requirement for an arrested diagnosis.

THE COURT: Well, then, you would interpret those findings as disclosing either one of two things: either that the doctors were in error; or that, if they were right, then at that time this lady was not suffering from either serious tubercular condition, nor a serious heart condition.

THE WITNESS: Well, it is very difficult because she was sent in with a diagnosis of active tuberculosis.

THE COURT: Was it not a suspicion?

THE WITNESS: Well, the fact that she was kept there—I don't know the details excepting what is on the records.

THE COURT: Did the records indicate anything more than a mere suspicion?

THE WITNESS: May I see that record, please?

MR. FOOKS: Yes.

(The records referred to were passed to the witness.)

MR. GERLACK: August 16, 1920, by Dr. Tappan.

THE WITNESS (Examining records) Diagnosis was made of chronic pulmonary tuberculosis by Dr. Tappan when she was sent to the hospital.

(Testimony of Dr. Harry Cohn)

BY MR. FOOKS:

Q. But, may I interrupt? If you read the doctor's remarks there—I think that is what the Court has in mind.

A. (Reading): "After careful consideration of all physical findings in this case, the writer feels that diagnosis of tuberculosis should have been given previously."

THE COURT: Now, does that indicate any findings based upon a single session with the patient?

THE WITNESS: Apparently so, your Honor.

THE COURT: Now, the medical report that was made at the Fort Bayard Hospital in October was a report following something like two months of observation of the patient.

THE WITNESS: She was admitted there in August, I believe.

MR. FOOKS: August 22nd.

THE COURT: Then, do you find the report upon her discharge?

THE WITNESS: I think it is right here, your Honor (indicating).

THE COURT: Does that indicate the date?

THE WITNESS: No. This says, "Left Fort Bayard 10/21/20; now in El Paso."

BY MR. FOOKS:

Q. The report was made on October 22. She left on the 21st.

A. Yes.

THE COURT: In other words, after two months' observation at the Fort Bayard Hospital the doctors there made findings to the effect that they couldn't find any active tuberculosis.

(Testimony of Dr. Harry Cohn)

THE WITNESS: Their diagnosis here, your Honor, says:

"Under observation for tuberculosis, pulmonary, chronic." Then,

"Pleurisy, chronic, fibrinous both bases." They advise hospital care.

This (indicating) is the hospital report, is it not?

BY MR. FOOKS:

Q. Yes, that is right.

A. Fort Bayard.

Q. I think I have a more complete record in the clinical record here (examining records).

THE COURT: What I am getting at is this, Doctor: As to whether you find anything in the report made at the time this lady was discharged from the Government hospital at Fort Bayard to indicate that the doctors at that time found any active tuberculosis?

THE WITNESS: Apparently they still had her under observation because, "Do you advise hospital care?" They still say "Yes".

BY MR. FOOKS:

Q. This is a more complete report (indicating). This is the entire clinical record of that hospital.

A. Which is the last one?

THE COURT: When you find the last chart, Doctor, tell us the date thereon.

THE WITNESS: (Examining charts) It must have been October 21, 1920. This was the report, "Examined by board".

MR. FOOKS: Speak a little louder.

(Testimony of Dr. Harry Cohn)

THE COURT: Will you tell us what the findings were?

THE WITNESS: It just says: "No tubercular activity; request patient discharged." There were no findings. There is no board report in here; just their statement.

BY MR. FOOKS:

Q. Suppose you look at the charts.

A. (Examining charts) A board examination was requested, and that is the statement of the doctor. The detailed report of the board is not in the record.

Q. May I help you?

A. (Examining documents) I don't find the board report.

Q. Well, as I see it, the doctor will agree with me that from those medical reports the patient went on a furlough from the hospital, as the report indicates, and on the 21st there is a notation on that report to the effect that she was in El Paso and had not returned. Now, as the doctor has just stated, there is a request there for a board examination. It does not show that it was given, except that the only thing is that the board noted on there that during a period of observation—

A. (Interrupting) Yes, it says "Examined by board".

Q. (Continuing) —"Examined by board; no tubercular activity".

A. (Reading) "Request for discharge for vocational training approved".

Q. The findings are included in the clinical records, the daily reports.

A. I mean, the board's report is not there. She was examined by the board. There should be a report by the

board in the record. It should be signed by a member of the board.

THE COURT: Well, in any event, Doctor, the findings or wind-up of the conclusions on the part of some board there at this hospital were to the effect that they found no activity so far as tuberculosis was concerned?

THE WITNESS: That was their conclusion; yes, your Honor.

BY MR. FOOKS: Q. And there is an examination made on the 23rd of August. Of course, I don't know if that was made by a board.

A. It is not, no. It was made by Dr. Beatty.

THE COURT: Would it be correct to say in brief, doctor, that you feel that at the time these various findings were made and various reports that have been read to you that the doctors making them were mistaken?

THE WITNESS: I would say that they were mistaken in their conclusions and in their classification, not in their findings.

THE COURT: Well, do you mean the same findings that these doctors reported you interpreted differently?

THE WITNESS: Yes, I wouldn't call a case arrested that I had under observation for two months, because I must have that patient under observation for six months under that classification.

THE COURT: Well, I am not referring particularly to this report when she was turned loose from the hospital at Fort Bayard and authorized to take up vocational training, but I have in mind the various reports that have been read here covering the period from December, 1919, to some date in 1926. In none of the findings is there

(Testimony of Dr. Harry Cohn)

anything to the effect that anybody found any heart trouble?

THE WITNESS: No, no. There is nothing definite in any of those records of '26.

THE COURT: And outside of this belief in 1919, which led to sending the plaintoff to the Fort Bayard Hospital, do you find anything in any of these reports to the effect that any doctor found present any activity so far as tuberculosis was concerned?

THE WITNESS: Yes, there was Dr. Tappan's statement there.

THE COURT: That was in 1919, was it not?

THE WITNESS: Yes.

THE COURT: I say, outside of that incident which led to her being sent to Fort Bayard from which, however, she was discharged in October—outside of that one instance, do you find anything in those reports to the effect that any doctor found tubercular activity?

THE WITNESS: Well, I would have to look at some of them again because I recall some of them had rales and findings which would indicate that finding; but I believe not—

THE COURT: (Interrupting) Well, wherever they found or hear rales, did they not indicate they were unable to find anything to confirm the presence of active tuberculosis?

THE WITNESS: Yes. They carried the diagnosis of arrested right through, excepting Dr. Holmes.

(Testimony of Dr. Harry Cohn)

BY MR. FOOKS:

Q. Dr. Holmes?

A. Yes.

Q. He didn't find anything.

A. He found it, but he said he found nothing.

Q. At least, he said he found nothing?

A Yes, sir.

Q. Well, referring just a moment, Doctor, to that particular examination that the Court has been interrogating you on—that is, Dr. Tappan—you read the remarks and conclusions, but you did not read the physical findings, and I think you will notice that he said that the X-ray did not confirm markings were not typically tuberculous. That is correct, is it not?

A. Yes. This (indicating) is the same X-ray report, though.

Q. Yes. So, you would not say that he made a definite diagnosis on that finding of active tuberculosis, but merely gave her the benefit of the doubt?

A. Well, I believe he placed himself in writing in that Fort Bayard record. May I see it again?

Q. Surely. He is not in this record, is he?

A Yes, he wrote a letter in that report there. There is a letter in here (indicating).

Q. Yes, there is a copy of that same report in here.

A. No, there was a letter he sent (Examining documents): Oh, yes, this is it.

There is a letter under date of August 18, 1920, in which Dr. Tappan says:

"I feel sure that an injustice has been done Miss Hill in not giving her a diagnosis of tuberculosis before this time."

(Testimony of Dr. Harry Cohn)

Q. However, he still bases his conclusion on the fact he still said the X-ray reports were not marked typically tuberculous?

A. He did not. The X-ray man said that. I think this was Dr. Cathcart's interpretation, not Dr. Tappan's.

THE COURT: Well, apparently in reliance on the insistence of this Dr. Tappan, she was admitted into this hospital at Fort Bayard, and after being under observation for two months they could not find anything to confirm the view that Dr. Tappan had. Is that the effect of it?

THE WITNESS: I believe so, your Honor. I am sure that is the effect of it.

BY MR. FOOKS:

Q. Now, reading from this X-ray again—the physical findings of Dr. Tappan:

"X-ray report made by Dr. J. W. Cathcart under date of June 29, 1920, is as follows:

"Lungs: Hilus shadows rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side."

In other words, as I gather this, the Doctor here is interpreting in connection with his physical findings the X-ray plate of Dr. Cathcart, and his conclusions are:

"Markings not typically tuberculous". That is the conclusion of Dr. Tappan?

A. Yes sir.

Q. And the X-ray report, as I understand it, Doctor, is very important in deciding whether or not a person may have active tuberculosis, as you testified?

A. That is right.

(Testimony of Dr. Harry Cohn)

Q. Doctor, Mr. Gerlack examined you to some extent on Dr. Wheeler. Do you recall the findings he made?

A. Yes, sir.

Q. There was some controversy about whether or not he made an active tuberculosis examination or diagnosis, or whether he depended on some other physician. The Doctor says:

"The only direct proof of tuberculosis is the finding of the tubercle bacillus in the sputum. All of the rest of the evidence is circumstantial and you have to have sufficient weight to establish in your mind a preponderance in favor of tuberculosis; as there are cases occasionally in which you will be wrong."

There are cases in which a doctor would be wrong if he bases his diagnosis solely on symptoms. I believe you testified, Doctor, that you may have tuberculosis and yet your sputum may be negative?

A. Correct.

REDIRECT EXAMINATION

There is very much more known of tuberculosis now than was known to the medical profession in 1919 or 1920 both as to cause and particularly much more knowledge as to the treatment of tuberculosis. Concerning whether it is easy or hard to find active tuberculosis in a chest, the chronic fibroid type as I testified Miss Hill has—well, the chronic fibroid infections are the ones that usually give the trouble. You have more trouble in diagnosing that type of tuberculosis than what you would call the exudative type. The exudative type is more simple to diagnose. A valvular heart can be present without murmur being heart, but sometimes the murmur is only heard under cer-

tain conditions. The fact that a person is examined and a murmur not heard does not mean conclusively that a murmur can not be present. Not at all. If Dr. McGill testied in his deposition: "We made a physical examination and the findings were rales of upper lobes of the lungs, a large heart with mitral regurgitation, otherwise known as mitral insufficiency, which to an average man is a large and leaky heart" If she had that condition which Dr. McGill testified was found not only by himself but Dr. Kirby, concurred in by the other doctors in that hospital when her case was discussed by the staff—if she had mitral insufficiency and mitral regurgitation, well she still has it today and will always have it.

Concerning the connection, if any, blue lips would have in connection with either tuberculosis or the heart condition—ordinarily it would have nothing to do with tuberculosis, but it would have—it would indicate that the tissues are not receiving enough oxygen. In other words, the heart is not pumping sufficiently. You may find blue lips in the sort of condition Dr. McGill found. After all, the tendency is for a loss of weight in tuberculosis—that would be more typical of tuberculosis.

RECROSS EXAMINATION

The following question was propounded and the witness made the following answer thereto:

BY MR. FOOKS:

Q I invite your attention to one of Dr. McGill's answers to a question concerning a mitral murmur he found in 1919 and which existed in 1921 and 1936 was so pronounced "even a novice could hear it. It has always been so bad that it would not take a heart specialist to detect it?

(Testimony of Dr. Charles O. Young)

Now, if you made an examination of that patient over a period of 16 years 28 times, you would naturally expect to find a heart condition, would you not?

A Yes, sir.

DR. CHARLES O. YOUNG

called as a witness on behalf of the plaintiff, having first been duly sworn testified as follows: I am a physician and surgeon licensed to practice in California, Illinois and Massachusetts; that I graduated at the Harvard University Medical School, Boston, Mass., in the class of 1893, and have continued to practice my profession since graduation; I have taken post-graduate work at the University of Berlin and in Hamburg, Germany; I have specialized for the last ten years in the diagnosis and treatment of heart diseases. During my practice I have been connected with St. Anthony's Hospital in Chicago, and the Washington Park Hospital in Chicago; I have practiced my profession in Los Angeles for the past nine years, and my office at the present time is located at 7th and Alvarado Streets, Los Angeles, California. On September 23, 1935, I first examined and prescribed treatment for plaintiff; my examination of plaintiff consisted of having her seated on a chair with the chest exposed, free from clothing, and I first examined the heart by using the stethoscope, placing the stethoscope over the site of the mitral valve where the sounds of the mitral valves are most heard. From my examination I detected the sound like a leakage through some aperature, known as a mitral murmur, and I listened further and found this sound was transmitted toward the left. The heart is a compound muscular pump located under the sternum, and to the left of the sternum about five

inches high and three and a half inches wide and approximately two and a half inches in thickness; it is divided into four chambers—two on the right side and two on the left; these chambers are lined with a mucous membrane, the lining of which is like the inside of a persons lips; the various chambers are divided by each other, separated by valves, and these valves are one-way valves so that they prevent the blood from going back and direct the flow; the valve between the left upper and the left lower chamber in the heart is called the mitral valve, which is the valve which is very often diseased. When the mitral valve is diseased there is a frequent flow of some of the blood into the chamber from which it came, there not being a perfect closure of the valve from that chamber to the lower chamber, and that the rushing back of the blood through this partially opened valve causes the murmur; the medical term mitral regurgitation is used synonymously with mitral murmur. On percussion I found that the heart was enlarged and palpated especially toward the left; I found plaintiff's heart was weak as indicated by the blueness of plaintiff's lips and hands; the designated medical term for this blueness is called cyanosis. In my opinion if plaintiff attempted to follow the occupation of a nurse it would aggravate her condition and make it worse. Basing my opinion upon the testimony of the lay witnesses, and the findings of the doctors upon their physical examinations of plaintiff, plaintiff's heart condition was the cause and had its inception at the time when plaintiff had influenza in 1918. In my opinion assuming that early in 1919 when plaintiff was examined by Doctors Kirby and McGill she had blueness of the lips and shortness of breath, plaintiff had a damaged heart at that time from

which condition there was no probability of a cure. Assuming the testimony I heard in the court room to be true, and basing my opinion upon the findings of the physicians that had examined plaintiff in 1919 until date of trial, plaintiff was suffering from a serious and incurable ailment for which rest is the prescribed treatment and which would be aggravated by work of any kind at the time of her discharge on February 3, 1919, I would classify the heart condition from which plaintiff was suffering at that time as myocarditis and mitral insufficiency.

CROSS EXAMINATION

Myocarditis and mitral regurgitation are progressive conditions, but I do not feel that plaintiff was any worse in 1935 when I examined her than she was in 1919. In a heart condition such as plaintiff had, if the person takes care of himself it does not necessarily become worse, but that overwork or any other kind of disease is likely to weaken the heart; that such a condition creates a weak point in the person's anatomy, which is likely to give way to any strain of physical exercise or disease. While rest periods would give her heart a chance to recover, a hard nursing case would give plaintiff a temporary set-back, keeping her heart condition practically what it was. In expressing my opinion that plaintiff had had an incurable heart disease since February 3, 1919, and that the disease was just as bad at that time as it was when I first saw plaintiff in 1935; I took into consideration the operation performed by Dr. E. Payne Palmer at Phoenix, Arizona, on April 24, 1927, as well as Dr. Palmer's physical examination, including the heart, prior to the operation and the administration of ether, and her rapid recovery so as to be

able to leave the hospital within five days. I did not accept the findings contained in the medical reports of the Government physicians who had made intermittent examinations of the plaintiff over a period of approximately eleven years including the findings made in the examination of Dr. E. Payne Palmer as being correct in arriving at my conclusion that plaintiff had had an incurable heart disease since February 3, 1919.

REDIRECT EXAMINATION

A person may have a severe valvular heart disease and upon examination the murmur may not be heard, for instance, if the person is sitting at the time of the examination there is a possibility that a murmur may not be detected, but if the person is standing or has been through exercises so as to make the heart beat more forcefully the murmur, if one exists, is usually heard.

DR. SAMUEL E. WELFIELD

called as a witness on behalf of plaintiff, having been duly sworn, testified under oath as follows:

DIRECT EXAMINATION

I am a physician and surgeon licensed to practice in this state and have been since June, 1918. I graduated from the College of Physicians and Surgeons in San Francisco. I am on the staff of Mt. Zion Hospital; have been for 14 years; Mary's Help Hospital, about eight years; and also Dante Hospital for 2 years. At the present time my offices are at 450 Sutter Street, San Francisco. My specialty is internal medicine. That includes heart and lungs, kidneys, gall bladder and liver. That is what is known as an internist. I examined Miss Hill the day before yesterday,

(Testimony of Dr. Samuel E. Welfield)

on Tuesday, over at the Board of Health Building in Dr. Cohn's office. The examination made of Miss Hill required about an hour and ten minutes. She appeared to be a woman who was well nourished, color poor; temperature was 99; her pulse was 96; respiration 20; nothing remarkable about her head; eyes reacted normally to light and distance; pupils were equal; no evidence of exophthalmos—that is, no protruding of the eyes. Exophthalmos is caused by goitre trouble. Nose, negative; mouth at the time showed good hygeine; throat, tonsils were out; larynx was inflamed and reddened; neck, palpable thyroid; no other glands palpable. At the lower border of the neck there was a scar about four inches long; chest: the chest was well clothed, and the contour normal; both lymphatic glands were apparently equal; on auscultation, increased resonance left upper lobe, slightly increased on the right lower base; on the left side showed evidence of crepitation, or friction rub, I should say. That evidently is due to a pleurisy. The left side of the base was negative to auscultation. Percussion: Decreased resonance; left upper lobe slightly decreased on the right side, and decreased both bases; more marked on the left side.

Auscultation means you listen to the chest with a stethoscope and you place the stethoscope in the upper part of the lungs—different parts of the lungs on each side—and compare them. Then, you go down to the base of the lungs and compare the sounds heard on both sides. The tactile fremitus, which is the spoken voice sounds that you can hear by putting your hand on the chest when you talk, and you get a little sound through the chest wall which acts as a sort of a sounding board—the vocal fremitus

was decreased on the left side upper lobe and decreased on both bases.

Her heart: The apex beat was in the fifth left interspace about three to three and a half inches from the costal margin, or the middle of the chest. Upon auscultation, listening to the heart with a stethoscope, there was a marked mitral murmur heard with evidence of mitral regurgitation.

The abdomen showed a scar about four to five inches long in the rectus (right) region. No other masses or tumors were palpable. "Palpable"—that means that you can feel them. Hips: Hip joints, normal in function; no evidence of crepitation on flexion and extension of the knee. That means cracking sound; grating sound of the knee on movement.

Left knee: Moderate amount of crepitation. Her blood pressure was 152/88. Reflexes were normal. Diagnosis: Chronic laryngitis; chronic pulmonary tuberculosis. The patient was fluoroscoped. The fluoroscope showed no evidence of activation; both sides showed calcified glands with some evidence of scarring that could be seen, or fibrosis, through the X-ray shackle. The picture there is marks of shadows which evidently were due to fibrotic changes; scar tissue replacement. The scar tissue in the lungs—well, that is usually the healing process of lesions. In this case it is lesions—tuberculosis.

The aorta was tremendously enlarged. I took a ruler and measured the aorta and its transverse diameter, and it was well over four inches, which would be approximately ten and a half centimeters.

(Testimony of Dr. Samuel E. Welfield)

The mitral heart, or the left lower border of the heart, was away over to the left side and beating quite rapidly. The beat was quite rapid. It is possible in the fluoroscope to see the heart beat. You can see the heart contract and relax and contract under the fluoroscope. The fluoroscope is where they place the patient between the X-ray tube and the examiner, and you can see the shadows reflected on the screen, the same as you do on a moving picture. Now the diagnosis: Chronic laryngitis. That is, the larnyx and the voice box and the tissue in that voice box is inflamed, which produces a huskiness or raspiness of the voice when a patient speaks. Chronic pulmonary tuberculosis, apparently quiescent at this time; chronic aortitis, chronic myocarditis, mitral regurgitation. Evidently the crepitation in the knees is due to a mild aortitis. As to what causes aortitis—usually any infectious disease will precipitate the incipiency of aortitis. Tuberculosis would cause aortitis. (The doctor then stepped to the blackboard and drew a diagram illustrating the various valves of the heart, and the aereation of the blood from the heart to the lungs.)

This is purely diagrammatic. The heart is divided into four chambers. The heart comes in here (illustrating), and the lower part of the heart carries the blue blood into the right aorta; right auricle (illustrating); left auricle (illustrating); the right ventricle (illustrating); the left ventricle (illustrating). Now, the blood comes from the systemic portion of the heart and carries the blue blood into the right auricle here (indicating) and it passes into the right ventricle. That is the tricuspid valve, the one I just referred to.

(Testimony of Dr. Samuel E. Welfield)

Now, just for diagrammatic purposes, I will place the opening here (illustrating). The blood comes around through the pulmonary artery, and it is the only artery in the body that carries the blue blood. The blue blood is carried by veins through the body and comes back through veins. This is the only condition in the body where that condition is reversed: The blood comes around then through the pulmonary artery, and here we have lung tissues. So it goes into all the areas of both lungs and there it is carried back through the pulmonary vessel down to the left auricle, and then the left ventricle and through this valve (indicating) which is called the mitral valve.

As to what causes the blood to change from blue to red —the blue blood is carried back by veins. It is blood that has been taken up from the different parts of the body tissues that are not oxygenated. All the oxygen has been withdrawn by the tissues. So, therefore, the blood is carried back to the lungs after entering the right side of the heart, so that it is oxygenated and carried through the left side, and from here (indicating) it passes through this valve (indicating), and this is the valve that Miss Hill has affected. That is what is called the mitral valve. It is affected in this manner: The muscles contract here. (indicating) A portion of the blood passes through this valve into the left ventricle. There is the efficiency of this valve. So, the blood, after entering the left ventricle is propelled by contraction from the left ventricle, instead of all the blood being carried out through the aorta, some of it backs up into the right auricle. The pressure or contraction of the muscles, or the muscular contraction, causes this pressure. So, it finds the point of least resistance.

(Testimony of Dr. Samuel E. Welfield)

Some goes into the aorta and some backs up into this valve (indicating), which is not normal, but impaired. When that happens it affects the patient—it means the function of the left ventricle is impaired to the extent where the heart has to work that much more in order to propel blood around through the system—the systemic part of the heart. While this is going on the patient feels—in moderate rest a patient doesn't feel anything at all. In an ordinary case of mitral regurgitation, when a patient exercises or attempts to do any work, the heart is whipped up. Then this deficiency does embarrass the heart action. The patient has a dyspnea, or shortness of breath; or hyperpnea, which is difficulty in breathing—the difference between the two, when this is taking place.

I spoke of the aorta, and the diagnosis of aortitis. The relationship that has to the heart and the function of the heart—looking through the fluoroscope, you see something like this between the two lugs out here (indicating). That is just about like this (illustrating). It is dilated to the left, propelling the blood up the ascending portion of the aorta. There are three parts to the aorta: One is ascending, transverse and descending. In other words the aorta is the main valve of the artery of the heart. Then the curve takes place here (indicating) in this aorta running back here (indicating). The force of this propulsion drive is exerted on the wall of the aorta out here (illustrating).

In Miss Hill's case, this vein came over about like that. (illustrating). In other words, it appeared to be almost twice the normal dilatation. There is no danger in a case of this kind of the aorta bursting or rupturing. Of course, something like that can develop to anybody in any heart

condition later on in life. At the present time there is no indication of any aneurysm, which is an extreme dilatation of a wall of a blood vessel produced by a tumor-like mass which the blood is propelled through.

The causes of blueness of lips described here—Cyanosis, ordinarily known as blueness of lips, is caused by the heart not being able to pump the blood fast enough for the purpose of oxygenation. Concerning lung scarring which resulted in tuberculosis, and any effect of not aereating the blood and causing blueness—when a person has tuberculosis for a number of years with repeated active lesions during that number of years, the lesions sometimes heal and that is replaced by scar tissue, which is known as fibrosis. There is no doubt that the more fibrotic tissue that is replaced in the lung, the portion of the functional part of the lung is decreased. In other words, you have a large lung which has been replaced by non-functional tissue. Scar tissue has no function. It is merely a replacement tissue. In other words, if the tuberculosis consumes the lung and eats the lung, where the lung is destroyed it is then replaced by scar tissue. It is no longer lung.

By my last two answers I mean that where the disease of tuberculosis in the lung has progressed to recurrent attacks over a period of years, the fibrotic condition in the lungs tends to produce or to lessen—put it this way—the oxygenation of the blood, which is pictured to the layman in the form of blue lips. That does not usually take place when the disease is in its incipient stage, although I might say this: Cyanosis can be present in the incipient stage due to that area of the lung being impaired to function.

(Testimony of Dr. Samuel E. Welfield)

If it is one of the upper lobes or both lobes, it is impaired in that area in function; but the rest of the lung is normal —normally able to take up its function. Any disease of a portion of an organ, and the organ loses the function of that amount in proportion to the amount of invasion, or the degree of the disease that is present. So, that incipiency—you would not have very much impairment of function excepting in that part that is affected would be moderately or severely impaired, depending upon the degree of disease that exists. For instance if you were to take a person with tuberculosis in this part of the lung and it sort of healed up and it became scar tissue, and it broke up later in this part and that became scar tissue, and then went on to another part of the lung and was active here and became scar tissue, the scar tissue would not have any ability to perform any function, and a person would have to exist with the rest of the lung that was not scarred, and also the same on the other lung.

There are two parts to the lung, one on the right side and one on the left, three lobes on the left and two on the right. If a person has lobar pneumonia, that means one of those lobes. The bronchi are the air passages that lead from the throat to the lungs and bronchial tubes. I have sat here through the testimony for the past 2 days. Assuming the testimony I have heard to be true, taking the facts I have heard as constituting the so-called history of the case, and assuming that the findings of the doctors—Dr. McGill, Dr. Sharp and Dr. Long, and these various other doctors who examined her and treated her from time to time, and also the findings of these Government doctors as manifested by these Government reports I have heard—

(Testimony of Dr. Samuel E. Welfield)

but not taking into consideration the diagnosis, or the conclusions of the doctors, in my opinion Miss Hill was suffering from chronic myocarditis, mitral regurgitation and chronic pulmonary tuberculosis at the time of her discharge, February 3, 1919.

If she had taken care of herself, meaning by that absolute rest over a period of years, in my opinion there would not have been very much change in her condition than exists today. I think that she is worse today, so far as her heart condition is concerned, than she was in 1919. As to how much worse—well, the heart disease is a progressive condition. She embarrassed that condition of that heart by attempting to work at various times, and with a very serious effect on the heart. The work that she attempted to do, required of a nurse, sometimes requires strenuous work. And any strenuous work would have a deleterious effect upon her heart, or any heart condition.

I heard her testimony to the effect that she had, what she described as, an easy job working in the hospital for the copper company, where she would lie down most of the time and answer the telephone, and about all the duties that she had for a time would be to bind up a lacerated finger or take a cinder out of the eye, and at times they would go six weeks at a time without a patient in the hospital. That was very light duty and that would not have very much effect upon her heart—that particular position. Other positions, where she was required to stand on her feet or be on her feet for any length of time, would have a deleterious effect on her heart. I think there is no doubt there was a marked aggravation of her heart condition, that the work she did since February, 1919, aggravated the condition and made her worse.

(Testimony of Dr. Samuel E. Welfield)

I have testified that I think her heart is worse now than it was in 1919, judging from the evidence here. And the work she did, in my opinion, aggravated and made it worse. All heart conditions are progressive, being progressive worse in this respect: That the pathology increases as the person grows older. The more care that that person takes of himself, the longer their expectancy. The longer a heart case—the better a heart case takes care of himself, the longer they will live. That applies to all heart conditions. It is an infallible opinion among the doctors that rest in many instances—60 per cent or more—enters into the cure of any heart disease. In the course of my practice I have patients who come to me with a condition indicating myocarditis and mitral regurgitation and I find for example, upon going into the history of that patient, that that patient has to earn a living. In treating that patient as far as I can I endeavor to get that patient to quit work for a period of time during which the patient rests. In certain cases, or in certain cases of heart disease, I find it is possible after a period of rest maybe covering many months, that under my care that patient is able to resume, say, a sedentary occupation and earn a livelihood. With an adequate period of rest that patient's heart will compensate itself to such an extent that they can resume some sedentary occupation. Exacerbations of the condition of that heart, however, although they pursue a sedentary occupation, may occur nevertheless from time to time after a number of years or a short time. When I get a patient who is 26 years old and appears to be well nourished, well developed, and examinations indicate a myocarditis, mitral regurgitation and the history discloses that that patient has been pursuing the vocation of a nurse,

(Testimony of Dr. Samuel E. Welfield)

I would ordinarily advise that patient to rest and quit all work. And, generally speaking, under ordinary conditions, after that patient had rested for several months, after a period of rest for two or more months, assuming that a patient has a heart condition uncomplicated with any other disease, that patient would go back to work and be kept under observation from time to time, and it is possible that they could continue to perform for some time that sedentary occupation, whatever it may be.

Supposing the same patient upon examination also disclosed pulmonary tuberculosis, I would require that patient to remain away from work and rest until such a time when in my opinion that tubercular condition had been arrested. Now some patients require a longer period of rest than others. It is probable that a patient who in 1919 showed the presence of pulmonary tuberculosis, a myocarditis and a mitral regurgitation, and who over a period of, say, six years has indicated from examinations reported in records of Government files, appeared to be an arrested case of tuberculosis and apparently presented no objective symptoms indicating a defective heart condition —assuming such a set of facts—that patient would be able to perform sedentary work, the continuance of which for any definite period would be very doubtful because of exacerbations of the lung condition or the heart condition. Where a case has been examined over a period of six years, with definite evidence that that patient is arrested over that period of time, as far as the tuberculosis is concerned, that would be eliminated. The heart factor, however, is something that would be indefinite. Where a person who in 1919 appeared to have pulmonary tuberculosis —active—myocarditis, mitral regurgitation, and who

(Testimony of Dr. Samuel E. Welfield)

thereafter during the period of, say, from the end of 1920 to April, 1927, when examined from time to time the findings failed to disclose either any activity as far as the tuberculosis is concerned, or any defective heart condition —during that period of time, in my opinion the patient would not be able to engage in a sedentary occupation, such as a clerical job sitting at a desk, and carry that on with reasonable regularity. She could not without deleterious effects, and it is my opinion that she would not be able to carry on any work for that period of time continually. She may attempt to but would not be able to continue doing so. It would make a difference whether she engaged in the strenuous work of nursing or in a sedentary occupation, such as sitting at a desk. In this case here there has been some testimony to the effect that this lady engaged in nursing covering on an average half of the time between 1923 and 1929, and that during that portion extending from 1924 to 1928 she averaged working more than half of the time as a nurse. If she performed her duties as called upon in those capacities, I would say that she was engaged in strenuous work. Unless she were favored I would say that the conditions under which she worked seriously aggravated whatever ailments there were with which she was affected. On the other hand, if instead of engaging in nursing she had followed a sedentary occupation, such as a clerical job at a desk, or, for example, doing clerical work in the office of the Nurses Registry, or doing clerical work in a hospital receiving department, I would say that that kind of work would materially have had a less effect upon her condition than the nursing did. I have found that there are patients suffering from myocarditis and mitral regurgitation, and who appear to be an arrested

case of pulmonary tuberculosis, carrying on in a sedentary occupation with reasonable regularity. In other words there are a lot of people who have to earn their living who nevert*hl*ess have some such ailment as this, but I have not yet had a patient with tuberculosis at some time complicated with a heart condition, who was ever able to carry on any occupation—sedentary or otherwise—continually for any length of time. When I say any length of time—it might be three months; a period of rest, and then again three months; and one month, and a period of rest; or six months, or a period of rest, or a year of continuous work. From the testimony here and the facts in this case that I have heard here, in my opinion the beginning stage or incipiency of her tuberculosis was following her acute infection in 1918 of Spanish influenza and bronchial pneumonia. I am bearing in mind the testimony of Dr. Wolfsohn. I know Dr. Wolfsohn personally very well.

Her heart condition was in the incipiency or beginning stage—it is my opinion that her valvular trouble began at the same time due to the infection of Spanish flu. I have an opinion as to whether or not her heart condition had progressed to the point where it was considered of a severe degree at the time of her discharge from the Army on February 3, 1919. My opinion is that it had progressed to a rather severe degree. Miss Hill appears to be fairly well nourished and these Government reports, these other reports and the depositions show her to be sort of fairly well nourished. This has no significance in connection with tuberculosis, excepting that if a person is underweight it is one of the symptoms. If they are of normal weight

or are over normal weight, it has no significance if other symptoms are present. All tubercular patients are not underweight. I think as many are above normal weight as are underweight. The production of the bacilli does not produce a toxic condition where the metabolism of the body will be affected. In other words, the tearing down, the breaking up of food and absorption of food is not materially affected, and the patient is able to maintain a fair degree of weight. There is no medicine to cure tuberculosis—the only chance is to give them good food and nourish the body, food and rest; sunshine and air.

Concerning His Honor asking me about Miss Hill sitting at a desk in a hospital or receiving ward, for instance, in a sedentary occupation, and concerning whether the mental worry and mental activity in connection with such an occupation have any tendency to increase the pulse rate, for instance, or aggravate either the heart or tubercular condition—mental work uses up sometimes as much reserve force of the heart as physical work. On the other hand there are other kinds of mental work that do not do that at all. These Government reports show that these doctors did not find objective findings of tuberculosis. Their diagnosis we will say, at times was arrested tuberculosis. If, during that period and while trying to carry on an occupation of nurse nursing patients, Miss Hill had recurring colds, was coughing and felt tired and exhausted, and on several of the jobs, as she described on the stand here, she felt so tired she could not get out of bed in the morning—under those conditions she could not obtain arrestment of tuberculosis. In other words, if her tuberculosis had been arrested she would not show those symptoms.

(Testimony of Dr. Samuel E. Welfield)

CROSS EXAMINATION

My specialty is internal medicine. That is what is known as the field of d*ig*nostician—some internists specialize in diagnosis only. Others specialize in internal medicine, which means diagnosis and treatment. I am in the latter class—diagnosis and treatment. I do not perform all of my surgical operations. If I have a surgical case that comes to me I diagnose the case. I have the X-rays made, if necessary, and all of the other necessary tests I feel are required, and I get my reports from the different laboratories and technicians, I review their reports, I come to a conclusion as to what is the matter with my patient, and then if it is necessary to have a surgical operation performed I refer them to some surgeon. If a patient came to me in 1927 complaining of distress in her stomach, abdomen, side, and I made an examination of this patient—I had blood tests made, had an X-ray made of the stomach and bowels, fluoroscoped the patient, and made the usual physical examination with the stethescope, percussion and auscultation—and then this patient, in addition to that, had told me that she had been troubled with a cough, and to be more definite in arriving at my conclusions I made an X-ray, or had an X-ray made, of the chest and reviewed that—if I found that patient suffering from a severe heart, an enlarged heart, mitral regurgitation, mitral insufficiency, myocarditis and aortitis and moderately advanced active tuberculosis, I would have recommend to that patient that she be operated on by a surgeon and that a general anesthetic be administered, and I would have made exceptions to that—in most heart cases that are examined for purpose of an operation, we

(Testimony of Dr. Samuel E. Welfield)

do advise them that they are a fair risk for a surgical operation, providing that the kidneys—or, put it this way—that there is no evidence of marked arteriosclerosis present. Those two things are the prime associated factors if a person's heart is impaired to find out if they are fit risk for an operation. And we do have and have advised operations in those cases where it is necessary.

Suppose that person had a severe incurable mitral regurgitation and myocarditis and aortitis to such an extent that she could not do any work whatever, not even engage in a sedentary occupation except that it would bring on exacerbations, or, at least, would further damage the heart for a period of eight years—I would still say that in urgency an operation would be advisable meaning the operation must be performed right now, urgency, not emergency, urgency, meaning it was necessary, meaning the operation must be performed right now.

Regarding the question of whether I would advise the administration of nitrous oxide, one-quarter of a pound, if necessary—not necessarily if I would advise those things, but if I would advise in the general administration of anesthetic the use of any sort of anesthetic that was necessary, and as much of it as was necessary to operate on that patient in that condition—we usually leave the choice of anesthetic to the operator. But, if I would be requested to express an opinion, I would say, "Yes, give as little ether as possible, as much nitrous oxide as you could; but cut down on the ether." That would be my advice. I would advise that the person be given as much anesthetic, of whatever character was necessary in order to require to perform this operation. In other words, I would put a

patient of mine in the hospital who had had a severe heart condition such as I have described here, and who had suffered from that condition for a period of eight years, and had at that time the same condition that she had for eight years continually. I would advise that person to go in a hospital and have such an operation requiring the administration of any sort of an anesthetic—ether and everything else, with such a heart condition. I would also, if that person, combined with her heart condition, had a tubercular condition that has existed for eight years, also combined with a heart condition.

Concerning the question of whether it would be possible to have a patient coming before me suffering from any condition in which I would not advise—in other words, I advised against—the administration of a general anesthetic—I would advise against it in acute infectuous diseases of the kidneys, and in arteriosclerosis in definite cavitations—that is, tuberculosis with cavitations—and in cases of acute febrile diseases. The term "tuberculosis with cavitation" means that some of the lung tissue has been eaten away. The presence of fibrosis or scar tissue indicates that some cavitation had existed, but had been replaced by fibrosis. When there is activity there must be some evidence of invasion, and the degree of constitutional symptoms will reveal that degree. In other words, when you have a moderately advanced pulmonary tuberculosis—with fibrosis—you are likely to have cavitation present at some stage; and depending upon the degree of activity at the time. It may be that at a particular time the healing process may be taking place; and at another time excavation may take place. I spoke of arteriosclerosis, I had reference to hardening of the arteries and added

(Testimony of Dr. Samuel E. Welfield)

to that was the febrile conditions and diabetes. Explaining the first point, that means acute infectuous diseases, which means tonsilitis, influenza, streptococcic infections, and anything of that type. So far as active tuberculosis is concerned that is not important at all, no. And even though cavitation is there, in a very moderate degree; in that diagnosed stage of tuberculosis moderatedly advanced. The cavitation would not be sufficient to interfere—would be no risk, in other words, in my opinion.

I did not come from San Francisco to Los Angeles for the specific purpose of examining Miss Hill and testifying in this case. I visit Los Angeles about every three months. I have a number of cases to see here every three months, patients that I had in San Francisco that moved here, and I usually bring my files along on the cases that I have to see; stay here a couple of days, and then return. I happened to meet Mr. Gerlack while here, and he asked me if I would testify in this case. I told him I would listen to the history the first day and if it was meritorious I would. I am in private practice; my patients in Los Angeles are private patients. I just happened to meet Mr. Gerlack in Los Angeles. I have not stayed over here for the purpose of testifying. My ticket calls for a return tonight. If it had been one more day I would have stayed over that day. I have testified in a few cases for Mr. Gerlack in San Francisco. I wouldn't say I testified "a number" of cases for him, I have testified in a few for him. Mr. Gerlack did not communicate with me before I came here. I know where Mr. Gerlack usually stops, and I happened to be at the same hotel.

I have heard all the testimony that has been brought into this case through depositions and doctors and govern-

ment doctors and these Governmental reports, together with Dr. E. Payne Palmer, who happens to be a private physician, not in any way connected with the government, and taking into consideration their findings over a period of about 11 years, when expressing my opinion that Miss Hill had this severe heart condition since 1919 to such an extent that any activity whatsoever—be it sedentary, sitting at a desk, or anything else—would injure and cause further progress of the disease, I disagree with some of the findings of the doctors who have examined her in those 11 years. It is a pretty long record, if you will read any to me, I'll tell you which ones I disagree with. (The file referred to was passed to the witness)

(MR. FOOKS, counsel for the Government hands to the witness a summary of the diagnoses.)

MR. FOOKS: I presume you would not consider the diagnoses, just the findings.

A. (Examining documents) Yes.

"Examination 6/7/20; Dr. W. E. Vandevere, Surgeon, United States Public Health Service, El Paso, Texas.

"Chest Examination:

"Lungs: Shape of chest—full.

"Has not lost weight.

"Chest measurements: Inspiration 38 inches, expiration 35 inches.

"Did not detect any pathological condition in chest except roughening over larger bronchi.

"Rate of respiration: 26.

"No haemoptysis.

"Heart: No valvular lesions detected."

I disagree with that.

(Testimony of Dr. Samuel E. Welfield)

THE COURT: What is the date of that, Doctor?

THE WITNESS: That is 6/7/20.

(Continuing)

"8/4/20; Dr. Ernest B. Thompson, Surgeon, United States Public Health Service, El Paso, Texas.

"Claimant extremely well developed and nourished. Chest full and expansion good. Some slight roughening on the larger bronchi otherwise chest negative.

"Diagnosis: Bronchitis, chronic.

"Doctor's Conclusions: Claimant able to resume former occupation as nurse and advises that she do so."

I disagree with that.

"8/16/20; Dr. J. W. Tappan, Surgeon, United States Public Health Service, El Paso, Texas."

MR. GERLACK (Interrupting) How many days is that after the last?

THE COURT: Now, just stop that! Anybody can add or subtract.

THE WITNESS (Continuing): "Claimant well developed and nourished; chest full and expansion good. Evidence of hyperplastic pleuritis, left base, with some post-influenza rales which may possibly be tuberculous. Fibrosis right lobe, upper, especially posteriorly. In view of report of X-ray findings, we have hesitated to give this claimant a diagnosis of tuberculosis though the present examiner feels sure that this should have been done long ago. X-ray report made by Dr. J. W. Cathcart under date of 6/29/20, is as follows: Lungs: Hilus shadows rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side. Conclusions: Markings not typically tuberculous.

(Testimony of Dr. Samuel E. Welfield)

"Diagnosis: Bronchitis, chronic; tuberculosis, chronic pulmonary."

I agree with that.

BY MR. FOOKS:

Q. You need not pass on the diagnosis, Doctor. I believe it is not proper.

A. We will leave it out. I agree with the physical findings.

Q. You disagree?

A. I agree.

(Continuing): "Claimant not able to resume former occupation as nurse. Should be in bed part of the time—able to travel; hospital care advised and was transferred to the United States Public Health Service Hospital #55, Fort Bayard, New Mexico.

"Vocational handicap major—vocational training not feasible.

"After careful consideration of all physical findings in this case writer felt that diagnosis of tuberculosis should have been given previously."

I agree with that.

Q. You agree with all that.

Now, then how about some more, especially after she got to the hospital? Let us find out if you agree with that.

A. (Continuing): "8/22/20: Physical examination:

"Inspection: Looks well, well nourished and developed, no chest deformities, expansion appears good and equal on both sides.

"Palpation: Slight decreased tactile fremitis both lowers.

(Testimony of Dr. Samuel E. Welfield)

"Percussion: Decreased resonance above 2nd rib and 3rd dorsal spine both sides, also both bases.

"Auscultation: Increased vocal resonance above 3rd rib and 4th dorsal spine right, and above third and third dorsal spine left. Broncho-vesicular breathing above 2nd rib and 3rd dorsal spine both sides. Diminished breath sounds at both bases. No rales heard.

"Diagnosis: Pleurisy, chronic, fibrinous both bases."

Shall I leave that out?

Q. Well, you might as well leave the diagnosis out. I am not asking you to pass your opinion on the diagnoses. I am asking you if you agree with their findings, if you still believe that according to their findings?

A. Yes, I agree with these findings, not the diagnosis.

Q. Go ahead. I want that particular hospitalization. I would like you to cover that, if you will, please.

A. (Continuing): "10/21/20; Dr. C. W. Coutant, Surgeon, United *State* Public Health Service Hospital #55, Fort Bayard, New Mexico.

"Statement:

"This is to certify that Miss Frances Hill, now a patient in this hospital is an arrested case of pulmonary tuberculosis, and physically able to accept vocational training."

I don't agree with that.

Q. You don't agree with that. Well, I do not think it is necessary to go any further. I presume you would naturally agree with those of your opinion.

A. My basis for not agreeing with these is the variance and the incompatability of the findings—the diagnosis, which I can't mention, I should say.

(Testimony of Dr. Samuel E. Welfield)

(Witness continuing): Concerning the question whether I would give more credit in my own case now, if a patient came before me and I made, what might be termed a routine—we won't call it "a routine"—an hour's examination of this patient, and after this patient had been hospitalized for a period of observation from August 22 to October 20, or October 21, under my observation, would I feel that I were better able to make findings after this period of observation, or would I believe that my finding originally made after one hour's examination would be stronger—That question can only be answered if I knew what the examination consisted of. Before a diagnosis of arrested tuberculosis can be made, certain examinations must definitely be made, and that patient kept under observation for a period of six months with the necessary exercise to see whether she is in an arrested condition. If that is not done, no doctor can make a diagnosis of an arrested case under any other circumstances. I do not mean anyone who has suspicions of tuberculosis must be under observation for six months. I said only those cases judged arrested.

Now in determining whether a patient has tuberculosis, then just as stringent and just as careful examinations must be made before that diagnosis is decided upon—and that includes sputum tests, X-rays, clinical findings, constitutional symptoms of fever which may or may not be present, loss of weight which may or may not be present, a feeling of a weakness, not able to do anything beyond the very slightest work, local symptoms of cough, expectoration, possible hemoptysis—meaning, expectoration of blood—and tubercular tests and sputum tests—and if those things are done, a positive diagnosis whether or not that

patient had tuberculosis can be done, and if it is not done, in most cases it cannot be made. That is the rule of the American Tuberculosis Association. After once you have been given a diagnosis and it has been determined you have active tuberculosis, they require six months of complete rest under certain conditions. You do not have to put the patient six months under observation for suspicious tuberculosis before you can say that they are arrested, if they ever had one. The majority of people at some time in their life have had unconsciously, without knowing it, tuberculosis. The majority of people, and you can make it 90, 95 or 85%—the greater majority. It usually occurs, and the reason we don't have so many more cases of active tuberculosis found is because, if I had tuberculosis at some time in my childhood, or during puberty, or after I had the necessary resistance to throw it off, therefore nothing happened. I have just got a few pieces of scar tissue instead of normal lung tissue, and that is the extent of it.

A study of chests has been made from autopsies, and it is found out that on practically everyone who dies, if there is an autopsy performed over them, in those cases where tuberculosis has not ever become progressively active, there are just a few pieces of scar tissue. It depends on the degree of involvement.

If I have a patient that comes to me with suspicions of tuberculosis, with a history of having had recurrent attacks of respiratory nature, influenza two or three times, bronchial pneumonia once, attacks of pleurisy from time to time, and subjective symptoms of that nature—that is, subjective symptoms which might be attributed to tuberculosis—and after examination of that person, the person

when he came to me would be suspicious from their history and their subjective symptoms that they possibly had an active tuberculosis. Then, after I had had them under observation for a period of two or three months, had made X-rays, and so on, and found scar tissue there—of course, with that history and scar tissue that I found, if I found their condition arrested, I would give them a diagnosis of arrested tuberculosis.

REDIRECT EXAMINATION

I thing the general toxic condition that resulted because of her tubercular condition was responsible for the gall bladder condition. I mean the poisons thrown out by the tuberculosis. A patient can have any organ in the body affected by myotasis, although the gall bladder is one of the most infrequent organs that are so affected. Ether accelerates the heart; a little stimulant to the heart; and in certain types of heart disease, uncomplicated, it does not produce any deleterious effect.

Her tonsils were out; she has no tonsils.

I heard these findings of Dr. Tappan and I heard read in evidence the findings of Dr. McGill, Dr. Long and Dr. Sharp, who examined her in 1919, 1920, 1921, 1935.

The findings of Dr. Tappan, the government doctor who examined her on August 16, 1920 are compatible from a medical standpoint with the tuberculosis findings of Dr. McGill, Dr. Long and Dr. Sharp. The findings are compatible.

(Testimony of Dr. Samuel E. Welfield)

Concerning the question Mr. Fooks asked me about this tubercular infection which practically all of us have—the difference between that tubercular infection and what is known as an active tuberculosis disease. What we all have is evidently an incipient tuberculosis, meaning a beginning or shortening incubation period, which the body is able to resist and nothing happens. In Miss Hill's case she has a moderately advanced type where the invasion or infiltration was marked, as shown by the X-rays and fluoroscope that I did the other day, and the classification of her tuberculosis is one of moderately advanced. She has had evidently exacerbations of quiescent and active periods from time to time since 1919.

RECROSS EXAMINATION

BY MR. FOOKS:

Q. There is such a thing as taking tonsils out and having them grow back, is there not, Doctor?

(Witness continuing):

It is possible to have your tonsils out and have small parts of tissue grow back. You still have something there —part of your tonsils. But not Miss Hill. Her tonsils are out—I didn't see any tissue grown back when I examined her the day before yesterday. I would definitely state her tonsils are out—not any tissue to the amount where you could say her tonsils are not out. In an operation that is not performed correctly, you may get a little tiny tab of tonsular tissue or lingual tissue away back in the

throat close to the tongue; but there is no tonsils there. Those tonsils are out, and when that patient is examined and a notation made, if the doctor wants to make a notation, it should be made "small tonsular tabs present" but not tonsils. A tonsil is a large—about the size of an almond—piece of tissue, enclosed in a capsule. When the tonsil is taken out you take the tonsil out with its capsule. A little piece from the base which is snared off—that part which is attached and is not enclosed in the capsule, may sometimes grow back. It is so small that in some cases it is insignificant, and in some cases it may grow the size of a rice grain.

(The witness, after being shown Dr. Palmer's report of examination that he made just prior to the time he operated on Miss Hill, April 25, 1927:) "I do not agree with that."

REDIRECT EXAMINATION

BY MR. GERLACK:

Q. Doctor, it states here about this examination: "Nose, throat, tonsils and teeth normal condition."

If the tonsils were out, would the tonsils be in normal condition on examination?

A. Well, if the tonsils are out, they usually so note it.

RECROSS EXAMINATION

BY MR. FOOKS:

Q. Yet, you never saw this woman until the day before yesterday?

A. I never saw her before.

DEFENDANT'S CASE

DR. LOUIS L. BURSTIEN

called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

My name is Louis L. Burstien. I am a physician by profession and graduated from Drake University, Des Moines, Iowa, in the year 1908. I have practiced my profession continuously since graduation up to about two years ago when I retired. I specialized in cardio-vascular diseases from 1923 up to the time of my retirement. The field of medicine known as cardio-vascular concerns diseases of the heart. I have specialized exclusively in heart diseases and have examined and diagnosed and recommended for treatment in the number of years that I have specialized in that particular branch of medicine well over 60,000 cases. I was in private practice up until the time of the war and was in the military service about two and a half years, then with the United States Public Health Service up until 1923 and with the United States Veterans Bureau from that time up to the time of my retirement. I served as a medical officer overseas.

I am familiar with the evidence as disclosed by the reports of physical examinations made of this plaintiff, Miss Frances Hill, between December 19, 1919 to and including November 7, 1931, when Miss Hill was discharged from the United States Veterans Hospital at San Fernando, California, and recall that evidence from two former trials. In addition to that evidence I am assuming that Miss Hill was examined by a private physician and surgeon in Phoenix, Arizona on April 24, 1927; the first visit made to Dr. Palmer's office was April 20, to be exact. Miss Hill at that time complained of a pain in her abdomen and

side, and complained of being unable to retain her food and otherwise had digestive disturbances, and after these complaints were made to the doctor and after he had made an examination at his office, which was a preliminary examination, he was of the opinion that she should be hospitalized for the purpose of having an operation performed in the event she felt her distress justified her operation.

Following that, Miss Hill went to the hospital and on April 24, 1927 she was given a diagnosis—or rather an examination by the doctor, and incidentally, that examination included—at least the doctor had the advantage of a pathological examination made by Doctor H. P. Mills, a pathologist, in which he found: "Appendix walls sclerotic, distal lumen obliterated. Microscopic sections show chronic exudates on the surface, and marked fibrosis of the walls. Chronic appendicitis. Gall Bladder not normal size; walls not thickened. Microscopic sections show a moderate degree of fibrosis of the walls with atrophy of the mucosa. No recent inflammatory changes."

In addition to that there was a urine and blood test made at that time. It showed: "Appearance of urine, clear; reaction, acid; specific gravity, 1020; albumen, negative, sugar, negative; acetone, negative; diacetic acid, negative; casts, negative; epithelium, aquamous; pus cells, 1-2; blood, negative; hemoglobin, 75%"—hemoglobin meaning the color content—"leukocytes per c. mm., 6400; large lymphocytes, 32%; polynusclear: neutrophiles, 67%; basophiles, 1%."

After the doctor had reviewed these laboratory reports and had made an X-ray in the course of the examination of the abdomen and parts complained of, and then in ad-

dition Miss Hill complained of having had a cough prior to her entrance to the hospital, and the doctor had an X-ray made of the chest, after that he made his examination prior to the operation, in which he made the following findings:

"General: Expression, one of discontent; skin, sallow; head and neck: Eyes react normally to light and accommodation; tongue slightly furred; nose, throat, tonsils and teeth, normal condition; no glandular adenopathy"—glandular adenopathy means the various glands of the body, and no glandular adenopathy means normal—. "No thyroid enlargement", I examined Miss Hill's thyroid at the first trial here in court and found it palpable. "Chest: Normal. Heart, normal position; apex beat in the fifth interspace; heart sounds are normal; lungs show moderate amount of fibrosis on X-ray; no abnormal sounds in lungs; no rales. Abdomen: tenderness under right costal margin with some muscle rigidity, of right rectus. Tenderness over lower portion of right rectus, especially marked on deep pressure. Neuro-muscular: Normal; cholocystogram shows retention of dye in gall bladder after thirty-six hours. Appendix not visualized. Tenderness in right iliac region on fluoroscopic examination. X-ray diagnosis was chronic cholecystitis and chronic appendix."

Miss Hill was then taken to the operating room on April 25, 1927 and prior to that time it seems that she was given two hypodermics, and then at 7:10 they began the administration of the anesthetic starting with nitrous oxide and then followed by ether. One-fourth pound ether was used, that is one can. Ether comes in quarter-pound cans. The patient was started on nitrous oxide. That is practically the same as what the dentist uses when he ex-

tracts teeth, you know, and probably after she was asleep they switched to ether and I would call it a normal amount, considering that both anethetics were used. In the operating room, using nitrous oxide to start with, puts them to sleep in a smoother fashion without so much of a preliminary struggling and unpleasant entry into the narcosis, into sleep. Incidentally, I might have said that at the time Miss Hill was admitted to the hospital she was accompanied by a friend, in other words, she was ambulant the night before the operation. In addition to the anesthetics mentioned, nitrous oxide and ether, it appears that they had to use other anesthetics in order to put Miss Hill to sleep and to complete the operation. The operation was performed, which took from 7:20 in the morning on the 25th of April until 8:55, after which she was removed to a room at 9:05. She had an uneventful recovery and was discharged from the hospital five days after admission on the representation she felt good enough to leave.

With that additional history, together with what I know about this case from the medical reports of the Government, and by reason of having attended as a witness in former trials of this case, and having become familiar with the findings incorporated in the various medical reports which form the Government files in this case, and having heard the testimony of Doctor Young, a witness for the plaintiff who testified at one of the former trials, and also Doctor Cohn, who testified for the plaintiff, and having heard a good many of the depositions taken in this case read, in the light of the testimony that I have heard here,

including what has been read to me this afternoon from the deposition covering the examination of Miss Hill in April of 1927 and an operation performed on her at that time, I have an opinion as to whether or not Miss Hill was suffering with any diseases of the heart and lungs at the time this operation was performed. This opinion is: any pathology, any diseases, if present at all in her lungs and heart would be rather negligible, if present at all. In view of the fact that a general anesthetic was given, that Miss Hill was on the table over an hour and a half with a serious surgical interference, removal of the gall bladder and removal of the appendix, and leaving the hospital of her own volition at the end of five days, which is certainly unusual, the only opinion that I could possibly hold would be that if any diseased processes of either the lungs or heart were present at all, it must necessarily have been of a minor nature, if present at all. I have an opinion if Miss Hill had had a diseased process in either the lungs or heart as I have expressed the opinion, of a minor nature, that condition would not have been of sufficient severity to have prevented her without injury to the disease, whichever it was, to have engaged in ordinary exercise, and if she had engaged in such activity there would be no condition there which would have been aggravated as far as the heart is concerned. As far as the lungs are concerned, I don't pretend to speak with authority on the lungs. All I know about the lung condition is what I heard of the testimony and what I heard of the testimony in previous trials and looking over the reports of previous examinations. At no time did it appear there was anything of a serious nature involved as far as either the heart or the lungs were concerned.

(Testimony of Dr. Louis L. Burstien)

At this stage of the trial the following proceedings took place:

MR. FOOKS: I presume that Counsel will stipulate that Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2 for identification may at this time be offered in evidence.

MR. GERLACK: No objection. I don't recall the circumstances of those.

MR. FOOKS: They were offered in evidence at the first trial. Plaintiff's 2, as I understand, was an X-ray of a normal chest, not Miss Hill's chest, but of a normal chest and so regarded; and Plaintiff's Exhibit 1 was a picture of Miss Hill's chest.

MR. GERLACK: There was a picture of her chest, but I don't remember the number. I will take your word for it.

MR. FOOKS: It was taken by you and in the Court's file ever since.

THE COURT: One of them will be designated as Defendant's Exhibit "J", and for the purpose of the record, after the Clerk has marked them, will you tell us again then what they now represent.

MR. FOOKS: Yes, your Honor.

THE COURT: The other will be represented as Defendant's Exhibit "K".

(The X-rays referred to were received in evidence and marked "Government's Exhibit "J" and "Government's Exhibit "K" respectively.)

MR. FOOKS: Next is Plaintiff's Exhibit 2 for identification only.

THE COURT: Is that still another one?

(Testimony of Dr. Louis L. Burstien)

MR. FOOKS: Yes, your Honor, two pictures of each X-ray.

THE COURT: Now then, we have one X-ray that is designated "Defendant's Exhibit J", and another one "Exhibit K", and another one "L". Will you tell us what Exhibit J depicts?

MR. FOOKS: Exhibit J is a picture taken of Miss Hill's chest in 1935. It is designated "Right"; I don't know what that means. The Doctor will have to explain that, I suppose. They were taken by Mr. Gerlack or at Mr. Gerlack's instigation, or by a physician at Mr. Gerlack's order, and were produced first by the plaintiff at the first trial, and at the second trial were produced by the defendant, both pictures of Miss Hill's chest in 1935.

THE COURT: What is this other one designated "Exhibit L"? What is the exhibit?

MR. FOOKS: The next one is "K".

THE COURT: Both "J" and "K" are X-ray pictures of the chest of Miss Hill, both taken in 1935.

MR. FOOKS: That is correct.

Q (By Mr. Fooks) Now, Doctor, I ask you to look at these X-rays which you have looked at before, I believe, and if you can tell us whether or not this picture shows an enlarged heart for the size and build of Miss Hill?

A There is no evidence of enlargement there.

Q The complete heart is not shown, is it?

A No, the lower part of the heart follows the outline of the upper half there. It is what we know as a .....shaped heart, although I doubt very much—was this a picture taken for heart or for lungs? There is quite a difference in the technique of the two.

(Testimony of Dr. Louis L. Burstien)

MR. FOOKS: It was produced the first time, as I think Mr. Gerlack will stipulate, for the heart specialist, Dr. Young.

MR. GERLACK: It was taken before he was in the case.

MR. FOOKS: It was produced at the trial and interpreted by the doctor.

MR. GERLACK: We didn't use it at the second trial. My recollection is that all the doctor testified was that it was a very bad X-ray, a poor specimen.

THE WITNESS: May I interject here. I doubt very much if that was taken particularly for the heart for the simple reason that the diaphragm here (indicating on X-ray film) obstructs the view of the lower border of the heart which would follow this outline (indicating), and if it were taken for the heart, the technique would be entirely different, and this diaphragm, by the proper breathing of the patient under instructions from the X-ray technician, the diaphragm would be down exposing the actual borders of the heart, you see. If this picture was taken for a heart plate, it is a very poor picture. But in any event, there is no evidence of enlargement, of relative enlargement there regardless. It is what we know as a sabot-shaped type of heart indicative, very suggestive of long continued disease of the thyroid gland possibly from long before puberty.

A JUROR: May I ask the doctor to point out the outline of the heart to us?

THE WITNESS: This picture is the patient facing towards you and this (indicating) is the left side. Now, the upper border of the heart starting right here (indicating) we can see it as far as this goes. Now, as I said

before, the diaphragm which is the membrane which separates the contents of the abdomen from the chest, by the wrong type of breathing used by the patient during the time the picture was taken, lifted up and it obscured the lower border. But having seen so many thousands of these hearts we know that it follows a line like this (indicating). We know from the appearance of the upper two-thirds of the heart just about where the lower border would be. But, as I said before, it is a poor picture.

JUROR: Where is the upper two-thirds of the heart?

THE WITNESS: Right here (indicating) This part is what we call the aorta. Part of this shadow here (indicating) is the breast bone, what we call the sternum. This border coming around here (indicating), that is the aorta, that is the great vessel that leads out of the upper heart, the upper part of the heart and distributes blood to the rest of the body. That is, the main exit of the heart is a pumping station to the rest of the body; but the heart proper is right here (indicating), begins about here (indicating). This is the outline of the aorta (indicating) and the shadow cast here (indicating) is a combination of the aorta, the sternum or breast bone, and also the spine in the rear. That is a conglomeration of all these shadows.

A JUROR: Would the picture show any enlargement?

THE WITNESS: That picture shows no enlargement of the heart. Enlargement of the heart is a relative proposition. For instance, actual measurements of the heart are taken with reference to the transverse diameter of the chest wall. For instance, from here to here (indicating). Now, if the transverse measurements of the widest part of the heart, to speak in plain language, if the widest transverse measurement of the heart is 50 per cent or less

(Testimony of Dr. Louis L. Burstien)

than the complete transverse diameter of the cage of the chest, thoracic cage, from one wall to the other wall, the heart is within normal limits in size. It is a relative proposition; for instance, what might appear an enlargement with one person would not be an enlargement with another person. That is why we take the comparative measurements of the inside of the chest wall in comparison to the measurement of the heart proper.

Nothing shows like that here. But I may add here that the technique of taking a heart picture is different than taking a lung picture. In taking a lung picture their object is to develop certain shadows in the lung tissue. But in taking a heart picture, they always take what we call a two-meter picture, that is, a distance of six feet. That obscures more or less the lung shadows and brings the heart shadows into clearer relief and gives you your comparative sizes so that it is easier to make the measurements. That is why this picture is a poor picture.

JUROR: What would a good picture show?

THE WITNESS: A good picture would show practically all of the heart; the diaphragm would have been dropped down. The diaphragm raises and drops as you breathe in and out.

Q (By Mr. Fooks) May I ask, can you tell, Doctor, if that is taken from the front or rear?

A. Well, I don't know about that, but the patient here is facing the gentlemen of the jury. This is the left side, just exactly as I am facing you now.

Q What difference is there in that picture and Government's Exhibit K—in other words, the picture was made at the same time—if any difference?

A This picture shows practically the same thing except that it is a *sti* poorer picture. It shows up more

properly the phenomenon of any pathology, if any present, of the lung tissue rather than the heart itself. You also have an obstruction of the lower border of the heart. You have complete obstruction by the diaphragm. I could hardly call that a heart picture at all. But it shows, in any event, no comparative enlargement to the measurement of the thoracic cage. You can see that at a glance.

In the previous testimony, in going carefully over the records on all measurements, heart measurements, as a matter of record of heart plates taken, which I didn't see but only the records of them of the official examinations made, the exact measurements of the heart in relation to the thoracic cage in millimeters and centimeters, in no case was there any enlargement, and it is borne out by this picture, poor as it is. There is no evidence of enlargement throughout any of the records in actual measurements.

MR. FOOKS: I presume, Mr. Gerlack, this picture was identified by Mrs. Greer and she testified that she took the picture on the 20th of September—or the 21st of September at one o'clock at your request.

MR. GERLACK: Yes.

THE COURT: The 21st of September.

MR. FOOKS: 1935.

Q Doctor, I don't know whether it is necessary or not, but here is the picture that has been stipulated, I believe, as a normal, good X-ray. It is stipulated that this is a picture not of Miss Hill's chest, but regarded as a normal chest.

A That bears out the remarks I made a few moments ago as to the level of the diaphragm here. The diaphragm, as I said, was the membrane that separates the contents of the abdominal cavity from the chest itself. Now, as

(Testimony of Dr. Louis L. Burstien)

you see, this shows about what you usually get in the outlines of a heart. Now, I wouldn't call this heart a particularly normal heart at that. It is what we call a drop-type of heart but nevertheless there is no enlargement and it is a rather small heart, as you gentlemen can see, in comparison to the thoracic cage from here to here (indicating on X-ray plate). We will just take the measurements here for curiosity. This is an inch rule (producing rule) instead of centimeters, but it will do. (The witness measures on X-ray plate) Approximately four inches; and the thoracic cage is around eleven inches. It makes it a rather small type of heart probably of a tall, rather slender type of individual. But you see, the thoracic cage here is eleven inches across. Any measurement of a heart up to five and one-half inches would be within normal limits. This is only four inches.

But it is a good, clear picture and gives you the outlines and shows you the outlines of the diaphragmatic wall.

A JUROR: What is the shadow, is that the heart?

THE WITNESS: Yes, that is the heart.

JUROR: That is about the way it shows?

THE WITNESS: In some cases. There are so many kind of machinery in connection with taking an X-ray, the technician, his type of work, some take very poor pictures; others take very clear pictures, and some have better X-ray machines to work with than others; and in certain types of pictures like in this other picture, you see, the shadows cast by the outlines of the heart were very dim and hazy. Here (indicating) they are a good deal clearer, although other pictures taken are much more clear than this. It is a matter of both X-ray technique and the quality of the machine that the picture was taken with.

(Testimony of Dr. Louis L. Burstien)

MR. FOOKS: I presume your Honor will instruct the Jury that this picture is not of Miss Hill or anyone that we know.

THE COURT: The Jury is instructed that this picture we are now examining does not reflect any condition of Miss Hill, the plaintiff.

MR. GERLACK: I understand, your Honor, it is produced simply for the purpose of comparison.

THE COURT: Merely to illustrate the doctor's testimony.

MR. FOOKS: I have an X-ray here that I appreciate the fact that if Counsel objects to the admissibility of this X-ray, why, of course I haven't the proper foundation laid. However, the X-ray was made on February 6, 1931 at Phoenix, Arizona. We have in our records the report of the X-ray which bears the same serial number, 2060, same date.

MR. GERLACK: I think I can shorten the procedure. I told Mr. Fooks at the start of this trial when he spoke to me about X-rays that if he would state he got them from the Veterans Hospital in San Fernando and they were the X-rays taken of Miss Hill, I wouldn't object to not laying a foundation.

MR. FOOKS: The situation is this: The X-rays at San Fernando have never been located. I have a doctor who will testify to the fact from San Fernando. We have the report of the X-rays but they were sent some place.

MR. GERLACK: Where was this taken?

MR. FOOKS: Phoenix, Arizona by Dr. Donnell.

MR. GERLACK: Did you get it from an official source?

(Testimony of Dr. Louis L. Burstien)

MR. FOOKS: It came from the Veterans Administration in Los Angeles.

MR. GERLACK: I will take your word for it that it is an X-ray of Miss Hill. I won't offer any technicalities.

MR. FOOKS: That is Defendant's next in order.

THE COURT: Marked "Defendant's Exhibit M."

(The X-ray plate referred to was received in evidence and marked "Government's Exhibit M")

MR. GERLACK: Do you recall, Mr. Fooks, whether that X-ray of a normal person was made of a man or woman?

MR. FOOKS: I don't recall. I don't know who produced it.

MR. GERLACK: Usually sometimes it has the name written on the X-ray itself.

MR. FOOKS: I was under the impression that the X-ray technician who produced these others produced that one for comparison.

MR. GERLACK: It wasn't the technician.

THE COURT: In the first trial it was marked as a plaintiff's exhibit.

MR. FOOKS: For identification.

MR. GERLACK: Is there a name on it? May I see it, the one of a normal person.

Q (By Mr. Fooks) Doctor, I show you an X-ray made on February 6, 1931. You have never seen this X-ray before, have you, as far as you know?

A I couldn't state.

Q In other words, I didn't show it to you at least today?

A No, not to my knowledge.

(Testimony of Dr. Louis L. Burstien)

Q And I ask you to examine that, Doctor, and tell us if it does show anything about the heart. I don't know. That is for you to interpret. Could you get any idea?

A That shows nothing pathological.

Q How about size?

A Size is within normal limits.

Q Doctor, you already expressed the opinion that from the evidence which you heard and the additional evidence given you by myself and the Court, from that evidence which comprises the medical reports of the Government together with the additional evidence of Dr. Palmer's operation and examination and the evidence which I believe you testified that you heard, Dr. Young's testimony on one occasion, and some of the depositions, would you have an opinion as to whether or not a person who was in the condition that you expressed the opinion that she was in as far as her heart is concerned—was concerned in 1927, could have had a heart disease or a condition of the heart on February 3, 1919 which at that time would have been irreparable and incurable? Would you have an opinion?

A Yes, I would have an opinion.

Q What would that opinion be, Doctor?

A The answer is no.

Q Now then, Doctor, if a patient were to come to you —we will put it this way: Assuming that a patient had come to you on April 20, 1927 and you had made a preliminary examination of that patient and you had sent her to the hospital and had the usual tests made, then had made a physical examination of that patient on April 24, 1927 and had found that patient suffering from myocarditis, mitral regurgitation, aortitis, moderately advanced, active tuberculosis—

THE COURT: You mean pulmonary.

(Testimony of Dr. Louis L. Burstien)

Q (By Mr. Fooks, continuing) Pulmonary tuberculosis, would you have recommended that patient to have submitted to an operation for gall bladder removal and appendectomy, and that the patient should be given a general anesthetic, if necessary, to perform that operation, unless it was such an emergency—unless such emergency existed that it would be necessary to perform an immediate operation to save life.

A If there were no emergency existing I absolutely couldn't possibly recommend a general anesthetic to be given in a serious surgical assault of that nature, and even if an emergency did exist I would have to warn the patient that they are taking this anesthetic at their own risk, although that wouldn't be the choice of anesthetic granting that such pathology of the lungs and heart existed.

MR. FOOKS: You may examine the doctor.

CROSS EXAMINATION.

I would not make a diagnosis of aortitis from an X-ray. It is merely suggestive and corroborative evidence. The evidence showed the measurements, as I recall, of plaintiff's heart were up to six centimeters which is within normal limits; unless positive clinical evidence was produced showing an aortitis I could not attach very much value to the X-ray. I am familiar with these Government records. If a person once has heart disease, he always has it if it is organic. Damaged heart includes aortitis. If she had aortitis in 1931 she would have it now.

The Government's medical report of May 29, 1931, from the Veterans Hospital at San Fernando reads, "Heart, PMI 6th interspace." That PMI stands for

three-quarters point of maximum intensity. The report also reads "left mid clavicular line; aortic second sound rather markedly accentuated with systolic murmur of aortic valve" which means a sound that is heard with a stethoscope designated as a murmur over that area. It would be rather careless procedure to make a diagnosis of aortitis with an X-ray alone. Systolic murmur of the aortic valve would indicate organic heart trouble. "Accentuated upon exercise over aortic and pulmonary valve areas" means the sound becomes louder with provocation such as exercise. It is possible that a person at rest and not stirring around might have a damaged valve in the heart, and the physician examining that person would not hear the murmur, particularly when they are examining the chest for rales and tubercular condition.

At this stage of the trial the following proceedings took place:

BY MR. GERLACK: Q Doctor, just for the purpose of understanding the matter, I understand that a stereo means that they take two X-ray pictures about a quarter of an inch apart, isn't it? Then they put them in the shadow box and each eye looks at a separate picture; that gives you depth?

A That gives you depth.

Q As far as looking in this shadow box—

A (Interrupting) This is just a flat one.

Q This is a picture of Miss Hill's chest, Government's Exhibit J. How can you tell where the lower border of that heart is?

A Well—

(Testimony of Dr. Louis L. Burstien)

Q (Interrupting) You are guessing at it?

A We went through this before, Mr. Gerlack. I can only repeat what I said before. You just naturally follow the outlines that you have visible.

Q You can't tell from this picture, can you, whether the border of this heart is here (indicating) or here (indicating), can you?

A Yes, just about. After examining thousands of hearts you know just about where that border will come to. That is merely the diaphragm obscuring the normal outlines.

Q What are these organs in here (indicating on X-ray plate)?

A On one side would be the liver; on the other side, the stomach; and all that area being the diaphragm pushed up to obscure the shadows of the heart.

Q Now, taking this normal picture here, Doctor—

THE COURT (Interrupting): Exhibit L.

MR. GERLACK: Government's L.

Q This shows the heart considerably smaller?

A That heart is what we call a "drop" type of heart and is small. You use the word "normal". I don't know whether that is a normal heart or not. Only a physical examination would determine it. It might be a very abnormal heart. The only thing we can say about it is that it shows the outlines clear. It is too small a heart for the thoracic cage.

Q It appears to me that this chest of Miss Hill's is not an awful lot wider than this chest here (indicating).

A We can take the measurements. That was taken in 1931.

(Testimony of Dr. Louis L. Burstien)

Q I think this was taken in 1935.

A 1935—well, you must remember, Mr. Gerlack, I never examined Miss Hill, never did examine her heart, and she may have heart trouble and aortitis at the present time. But all of the records of the measurements, the actual measurements taken show no evidence of enlargement.

Q Doctor, isn't it a fact that the size of hearts varies with individuals? Some have small ears, some have large ears; some have small noses, some large noses.

A Yes, sir.

Q A small man with a large nose and a large man with a small nose?

A That is right.

Q Isn't it a fact you get a large person sometimes with a small heart normally?

A That is the reason why we use the thoracic cage diameter as a comparative instead of taking the actual measurement of the heart itself. If the heart is within 50 per cent of the diameter, finding nothing else wrong with it, we call it within normal limits.

Q Doctor, if Miss Hill had what Dr. McGill found in 1919—he examined her when she first came back from the war, which was along in the latter part of January of 1919,—and he made these findings:

"We made a physical examination and the findings were rales of upper lobes of the lungs, a large heart with mitral regurgitation, otherwise known as mitral insufficiency, which to an average man is a large and leaky heart."

(Testimony of Dr. Louis L. Burstien)

If she had that condition of a heart with mitral regurgitation in 1919, she would have it today, wouldn't she?

A As that question is put, I don't think I can answer that fairly. Assuming that Dr. McGill—is that his name—that Dr. McGill found all these findings and then we have numerous, very numerous examinations made subsequent to this examination—

Q (Interrupting) I beg your pardon; the simple question was this: If Dr. McGill found that condition—I will withdraw that and put it this way: If, as a matter of fact, she did have a large and leaky heart with mitral regurgitation, if she had a large heart with mitral regurgitation in 1919, she would have it today and will have it as long as she lives?

A I will answer that she would have had it all the time from that time on.

Q Yes. In other words, a condition like that is never remedial?

A A condition like that may be under proper treatment arrested, but as far as absolutely cured is concerned, it is not.

Q Once a damaged heart, always a damaged heart?

A Yes.

Q Now, Doctor, are you familiar—you say you are familiar with these Government records here?

A Yes.

Q Do you agree with them?

THE COURT: That is a pretty broad question.

(Testimony of Dr. Louis L. Burstien)

BY MR. GERLACK:

Q Do you agree with the findings of these doctors?

THE COURT: Is there any particular report that you have in mind, Mr. Gerlack? I think the question is too broad.

MR. GERLACK: I think probably it is.

Q Here is what I have in mind, Doctor—

THE COURT (Interrupting): As I understand it, this digest was prepared by Government counsel and submitted to you, Mr. Gerlack?

MR. GERLACK: Yes, your Honor. As far as I can see, it seems to be fairly accurate.

Q Now, Doctor, calling your attention to the examination made by Dr. W. J. Tappan, surgeon, United States Public Health Service, El Paso, Texas, August 16, 1920, wherein he says, "Claimant well developed and nourished; chest full and expansion good. Evidence of hyper-plastic pleuritis, left base, with some post-influenza rales, which may possibly be tuberculosis. Fibrosis right lobe, upper, especially posteriorly. In view of report of X-ray findings we have hesitated to give this claimant a diagnosis of tuberculosis though the present examiner feels sure that this should have been done long ago. X-ray report made by Dr. J. W. Cathcart under date of June 29, 1920, is as follows: Lungs—hilus shadows, rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side. Conclusions: Markings not typically tuberculous."

And the Doctor further states, "After careful consideration of all physical findings in this case, the writer feels that diagnosis of tuberculosis should have been given previously."

(Testimony of Dr. Louis L. Burstien)

Now, Doctor, the next examination—the previous examination, previous to that, was 12 days before, and was on August 4, 1920, by Dr. Ernest B. Thompson, surgeon. Public Health Service. He says:

"Claimant well developed and nourished; chest full and expansion good. Some slight roughening on the larger bronchi, otherwise chest negative."

Now, Doctor, is it possible for a person—by the way, these findings on the examination by Dr. Thompson on August 4, 1920, shows a practically normal person, do they not?

A Practically so, yes.

Q In your opinion, is it possible for a person to develop a condition shown by Dr. Tappan in as short a time as 12 days?

A Well, Dr. Tappan's findings, Mr. Gerlack, as far as his findings here are concerned, they do not show anything positive either.

Q He states here that the diagnosis—

A (Interrupting) He makes a diagnosis of chronic bronchitis and tuberculosis, but qualifies that by the conclusion that the markings are not typically tuberculous, and the diagnosis is pleuritis, which is bronchitis. It would be natural if tuberculosis would be suspected that they would tell a person to stay abed part of the time and get proper rest and proper treatment, just merely precautionary.

Q He did send her to the hospital as you see in the next report?

A Yes; that is true. It says, "Hospitalization not advised, although claimant will accept, if necessary."

(Testimony of Dr. Louis L. Burstien)

Q Are you reading? Read the notation under "Doctor's Conclusions," by Dr. Tappan.

A Yes. At that time "Hospital care advised and patient transferred to Fort Bayard, New Mexico. Should be in bed part of time. Able to travel."

Q Read the line above that, Doctor.

A "Doctor's Conclusions: Claimant not able to resume former occupation as nurse. Should be in bed part of the time. Able to travel. Hospital care advised, and was transferred to United States Public Health Service Hospital at Fort Bayard, New Mexico. Vocational handicap major—vocational training not feasible. After careful consideration of all physical findings in this case, writer felt that diagnosis of tuberculosis should have been given previously."

Q Doctor, do you think from this X-ray of the heart which you told us was what you called a "sabot-shaped" heart—

A (Interrupting) Yes.

Q (Continuing) —do you think that she is suffering from thyroid trouble at the present time?

had some of the residuals of an old thyroid trouble.

Q You don't contend she is suffering from thyroid trouble at the present time?

A No. The shape of that heart merely indicates an old thyroid condition of many years' standing; that is all.

Q The basal metabolism test is a recognized test for thyroid trouble, is it not?

A It is merely corroboratory evidence.

Q It is about the surest single test that there is, is it not?

A No, I wouldn't say so.

(Testimony of Dr. Louis L. Burstien)

Q When the basal metabolism test is given, what are the limits of the test concerning which they decide whether a person is within normal limits?

A Oh, plus 10 to minus 10.

Q 10 either way. Minus 2 would be considered within normal limits?

A Within normal limits, yes.

Q Doctor, I understood you to say you didn't hear Miss Hill's testimony at either trial?

A No, I did not.

Q You saw in this record that she left the hospital after five days. Had she left the hospital seven days after the operation, would that make any difference in your testimony here as to the seriousness of the condition at the time this operation was made?

A If she left seven days instead of five days after?

Q And she left on a stretcher.

A Why, an operation for removal of gall bladder is a very serious operation and the average length of time that a person is in bed confined is around two weeks or more; and because there was a double surgical assault here inasmuch as the appendix was removed, and the presence of serious pulmonary or heart pathology would certainly contra-indicate the use of a general anaesthetic.

Q There is nothing unusual in using a general anaesthetic on patients suffering from T. B., especially, is there?

A Well, it is a very risky proposition.

Q It is done every day, is it not?

A Well, it is at the patient's risk. Nowadays, of course, the anaesthetics are being improved right along, and a good many of the tubercular—I don't qualify as a

tubercular specialist, but I know that at Fitzsimmons General Hospital, which is a tuberculosis hospital, a good many of the operations, major operations, on tubercular patients were done under local anaesthetics, even serious operations, such as removal of thyroid and things like that.

Q For instance, Doctor, take this operation where they go out in back.

A Spinal anaesthesia.

Q A case where a lung, one lung is completely eaten by the ravages of tuberculosis, to stop the lung from moving—

A (Interrupting) Thoracoplastic.

Q That is a thoracoplastic, and those are done every day. They are only done in a far-advanced case of tuberculosis, aren't they?

A Well, I don't feel qualified to answer that. You are getting out of my realm now.

Q Doctor, ether, as I understand, is considered more or less of a stimulant to both heart and lungs?

A Ether?

Q Yes.

A Yes; rather than stimulant—the word "stimulant" would not be the proper word. Let us call it more of an irritant rather than a stimulant.

Q What I mean, it is considered fairly safe even for an operation on people having heart trouble?

A Well, I wouldn't consider it so, no.

Q I mean, it doesn't necessarily follow because a person has a bad heart and is given a general anaesthetic by the use of ether that there is necessarily going to be any bad after-effects?

(Testimony of Dr. Louis L. Burstien)

THE COURT: When you say "necessarily," you mean, is there any danger?

MR. GERLACK: Yes; I mean probable danger.

THE WITNESS: Yes, the only way I can answer that, Mr. Gerlack, is that I wouldn't undergo a general anaesthesia myself with a serious heart condition.

I certainly wouldn't advise anybody else to do what I wouldn't do.

BY MR. GERLACK: Q You suffer from heart trouble yourself?

A Yes; exactly.

Q I believe you are rated permanently and totally disabled yourself?

A Yes.

REDIRECT EXAMINATION

BY MR. FOOKS:

Q One question, Doctor: Is the electro-cardiogram similar—is it used for the same purpose to confirm a heart condition as the X-ray is to confirm a chest condition, in other words, corroboratory?

A Corroboratory, I believe, yes.

MR. FOOKS: I think that is all.

MR. GERLACK: That is all.

BY THE COURT: Q Doctor, there has been a good deal of interrogation here, but so far as the period of time is concerned, it seems to have related to the time this lady went under this major operation in April of 1927. You have told us that you have studied these medical reports; that you heard the testimony of Dr. Young, Dr. Cohn, and then you heard the testimony read

(Testimony of Dr. Louis L. Burstien)

here this afternoon relative to the conditions reported as existing in April of 1927.

A When I heard Dr. Young and Dr. Cohn that was not at this trial; that was at the previous trials.

Q Yes.

As I understand, is there any claim that there was any substantial departure at this time?

MR. GERLACK: No, I think not, your Honor.

BY THE COURT: Q In the light of what these medical reports show—I am speaking now of the reports in the Government files, including what they show as to a work record—have you an opinion as to whether or not on September 1, 1919 this lady was suffering from such a heart condition that she would be unable to pursue some substantially gainful occupation such as a sedentary vocation with reasonable regularity and without endangering her health. Have you an opinion one way or the other?

A Yes, your Honor.

Q What is that opinion?

A The answer is "Yes", as far as the heart is concerned.

Q Will you tell us just what you mean when you say "Yes"?

A I mean that there was from 1919—of course, at the present time the plaintiff may have a heart condition, but from the records and from 1919 and all the records on, there is nothing of a heart pathology shown.

THE COURT: Perhaps we can get at the matter a little more clearly.

Q You have stated that you have an opinion as to what this lady's condition was as of September 1, 1919, with respect to her pursuing some substantially gainful

occupation. Now, so far as the period is concerned covering say, from September 1, 1919, until April, 1927, when she underwent this major operation, in your opinion was she able on September 1, 1919, to pursue some substantially gainful occupation with reasonable regularity such as a sedentary occupation without endangering her health?

A As far as the heart is concerned, yes.

Q Now, then, as I understand it, you are not prepared to express any opinion with reference to the lung condition?

A Well, I do not feel it would be fair for me to do so because I don't feel qualified to do so. There are other men better qualified to do that than myself.

Q In other words, your answer is not to be understood that you see anything in this record that would cause you any doubt about it, but from a professional standpoint, because you don't specialize in diseases of the lungs, you prefer not to express an opinion?

A Exactly, your Honor.

THE COURT: The Court has no other questions.

RECROSS EXAMINATION

BY MR. GERLACK:

Q Doctor, if she had a large and leaky heart such as Dr. McGill found in January, 1919, the mitral regurgitation and she also had a heart murmur as found in 1920 or '21—I believe that both Dr. Sharp and Dr. Long found—it would be dangerous to her health and aggravate her condition, make her worse, if she engaged in an occupation or engaged in physical activity, would it not?

A I can only take the whole picture.

(Testimony of Dr. Louis L. Burstien)

Q Just answer this.

A That couldn't be properly answered.

THE COURT: I think Mr. Gerlack's question means this: Disregarding or assuming that you hadn't heard or hadn't seen these other records, assuming that you knew nothing more about the case than that she did in fact have such a heart condition as Mr. Gerlack has described.

THE WITNESS: Assuming such to be a fact, there is only one answer I could give to that, and that is,—I don't know how you framed the question—I think the answer would be no, it would be dangerous for her to continue, assuming such pathology to be present.

BY MR. GERLACK: Q Assuming that to be true.

Doctor, your view of this case is based largely upon the Government records that you have seen, and without taking into consideration the testimony of Miss Hill and these various other witnesses who observed her in and out of the service. That is true; isn't it?

A Yes, I went over the records very carefully.

MR. GERLACK: That is all.

MR. FOOKS: That is all.

THE COURT: You referred to Dr. McGill—who were those other doctors?

MR. GERLACK: Dr. Sharp and Dr. Long.

THE COURT: Is there in the deposition of anyone anything indicating that they were testifying from a record or testifying exclusively from memory?

MR. GERLACK: I think both were testifying from memory.

THE COURT: All three of them?

(Testimony of Dr. Louis L. Burstien)

MR. GERLACK: Dr. McGill testified—he had the record in 1933 when he stated he made a record for the Veterans Administration and sent an affidavit, and he had that affidavit. He testified on this deposition.

THE COURT: What I am getting at is this: The testimony given by these three doctors, including Dr. McGill, was not based upon any record made at the time of the examinations?

MR. GERLACK: Yes.

THE COURT: As far as Dr. Sharp was concerned, he had no records; as far as Dr. Long was concerned, he had no records; as far as Dr. McGill is concerned, what did his deposition disclose as to having a record that was made at the time of the examination?

MR. GERLACK: He states in his deposition that in 1933 he gave Miss Hill an affidavit to be used and filed with the Veterans Bureau. When he gave this deposition in '35 or '36, I think he testified in one or two of the depositions that at the time he was testifying at the deposition he had a copy of the affidavit, and at the time he made the affidavit, he had a copy of the record itself. The record was lost. He didn't know who got it, whether he gave it to Miss Hill or whether to the Veterans Bureau man. But in that way he did have a record; he had a record of his record—I would put it that way.

THE COURT: You mean he had an affidavit made in 1933 from a record that he had made in either 1919—

MR. GERLACK: (Interrupting) He had the record before him when he made the affidavit. He incorporated that in the affidavit. He had the affidavit when he made the deposition.

(Testimony of Ross M. Crosher)

MR. FOOKS: I will clarify that to some extent. We sent the affidavit to the doctor, the Government did. In other words, we sent him an affidavit—a photostatic copy of the affidavit, that he had furnished the Veterans Bureau in 1935. That was the only record that he had before him at the time of making the deposition, the affidavit that was furnished by the Government.

ROSS M. CROSHER

called as a witness on behalf of the defendant, having first been duly sworn, testified as follows: I am Assistant Secretary of the Pacific Mutual Life Insurance Company which has been in existence for the last week or ten days, that is the new company. I was 35 years with the Pacific Mutual Life Insurance Company of California, which is the same company I am now employed by, except it is reorganized. I was subpoenaed here today to bring certain reports pertaining to Frances Hill. I am the official custodian of those records for the purpose of appearing here. I am prepared to testify that the records I brought here were the official records of the Pacific Mutual Life Insurance Company of California, and now are the official records of the Pacific Mutual Life Insurance Company as reorganized, and that those records were made and kept in the regular order of business. This is an original application dated October 22, 1924 for two life income bonds maturing at the age of 55 providing for monthly payments of $25.00 each at maturity. These bonds were issued on December 5, 1924 and January 5, 1925, respectively. The annual premium rates on each of the bonds issued was $171.13; there were four annual premiums paid on the bond issued December 5, 1924, this

bond was in force and effect until December 5, 1928; there were three years' premiums paid on the bond issued January 5, 1925, causing that bond to remain in force and effect until January 5, 1928. Both of these bonds were surrendered for cash and a check dated July 20, 1928 was issued in favor of the plaintiff in payment of the first bond in the amount of $54.62, and a check dated May 21, 1928 in payment of the second bond in the amount of $23.56. Miss Hill had effected a loan of $547.20 on the bond issued in December 1924, and $370.44 on the bond issued in January 1925, and the checks in settlement of these bonds in the amounts of $54.62 and $23.56 were the remaining cash surrender value on these bonds after deduction of the loans.

CROSS EXAMINATION

There was no physical examination taken in connection with the application for these bonds; no life insurance ever was issued in connection with it, no physical examination made in connection with it, there were no sick benefits, application for sick benefits, nor any health insurance whatsoever made in connection with the application. There is no evidence in the file as to whether the company doctor of the Pacific Mutual Life Insurance Company in Phoenix at the time of the application was Dr. Sultz, and does not show a report of any physical examination made by Dr. Sultz of Miss Hill; all that shows in the records of the insurance company is that she applied for an annuity bond payable in the amount of

(Testimony of Ross M. Crosher)

$25.00 a month at age 55 with an annual premium of $171.13 on each bond. I couldn't say just when she first borrowed on the bonds. The records probably wouldn't show. I presume the liability terminated upon endorsement of these checks—$23.56 dated May 21, 1928 and $54.62, dated July 20, 1928.

REDIRECT EXAMINATION

There were just two bonds, that is, each bond provided the payment of $25.00 a month at the age of 55.

RECROSS EXAMINATION

I think that is all of the records of the insurance company relating to Miss Hill. There is no record indicated here and to the best of my judgment there was no physical examination or application for life insurance in the files of the insurance company. A physical examination or the physical condition of a person taking out that kind of an annuity bond is not material; it is really purchasing a deferred annuity; it is more in the nature of a savings account than life insurance; it does not involve life insurance in any respect. I am pretty sure Miss Hill had no other dealings with the Pacific Mutual Life Insurance Company. I produced all of its records regarding these bonds and had no difficulty in finding them and I do not believe there are any other policies for Miss Hill at any other time. It is not usual in this type of bond to take out a sick benefit with the bond.

(Testimony of Dr. J. J. Klein)

DR. J. J. KLEIN

called as a witness on behalf of the defendant, having first been duly sworn, testified as follows: I am a physician and graduated at the University of Michigan in the class of 1892, and the University of Buffalo in 1910; I have practiced my profession continuously since graduation and have specialized in the treatment of tuberculosis for the past 18 or 20 years; I have been connected with the United States Veterans Hospital at San Fernando, California, for the past eight or nine years. If my memory serves me right, I was a member of the staff of the San Fernando Hospital in April 1931. I didn't remember Miss Hill when I was called on the case but after I met her, I recall her now. I could not testify concerning Miss Hill from my own personal recollection but would have to have my memory refreshed. Upon being shown Government's Exhibit H for identification and having refreshed my memory therefrom, directing my particular attention to the report dated April 3, 1931, the date of admission of Frances Hill, United States Veterans Hospital at San Fernando, California, which bears my signature, being particularly concerned in the lung examination, I find from this record there was a slight increase of palpation fremitus over both upper lobes in plaintiff's lungs; percussion over the right lung was negative; that there was a slight decreased resonance above the 3rd rib and 5th dorsal spine, more marked in the second interspace anteriorly; that the right lung, on listening with the stethoscope, the whisper and breath sounds were within normal limits, and no rales heard. In the left there was an increase in the whispered voice and there was slight

bronchial vesicular breathing above the 2nd rib and 5th dorsal spine; that the breath sounds were somewhat harsh, but no rales were heard. The summary of my findings at the time of the examination on April 3, 1931, was: "Fibrosis left upper. Diagnosis, tuberculosis, chronic, pulmonary, minimal inactive." There was some question about plaintiff's heart being affected at the time of my examination and for this reason in my first diagnosis I noted on my report that plaintiff should be put under observation for heart disease, and that was later changed to tachycardia simple, "as per electrocardiograph made at Sawtelle, California." The interpretation of the electrocardiograph was not made by me. Tachycardia simple means a rapid heart action usually brought about by little exertion or excitement and after rest it seems to subside. Tachycardia simple is a synonymous term with palpitation.

Being shown Government's Exhibit N for identification, a file of clinical records from the Veterans Hospital at San Fernando, California, and after refreshing my recollection therefrom, I find I was Miss Hill's ward surgeon a great deal of the time. She was admitted to the hospital for treatment April 3, 1931, and her initial chest examination was the one that I quoted a while ago. Not being a cardiac man, I asked for a Board examination on Miss Hill. By a "Board" examination I mean a group of doctors, medical men, a Board of three medical examiners, consisting of Dr. Walker, Dr. Harrod and myself. In that examination the diagnosis of tuberculosis, pulmonary, chronic, minimal was confirmed inactive; the Board also gave Miss Hill a diagnosis of chronic aortitis with a well compensated heart, not of syphilitic origin, probably

rheumatic. During her stay in the hospital her sputum examinations, we have a record of ten, were all negative for tubercular bacilli. Miss Hill was put on a graduated exercise shortly after she entered the hospital, but kept that up for a short period and she was taken off of that on account of she said her heart beat fast, and there was also some question of a little arthritis. I mean by "graduated exercise", the temperature is usually taken in the morning before the patient starts out. She is asked to walk a certain distance at regular gait, and then she comes back to the ward and rests for about 20 minutes, when the temperature is again taken. Where there is active tuberculosis, of course, exercise usually raises the temperature above the ordinary line of temperature that she has. The graduated exercise, as a rule, continues until we are satisfied in regard to making the diagnosis. In this case we had to give that up more on account of her heart than anything else. We were satisfied that there was no activity present as far as tuberculosis was concerned. She was discharged from the Veterans Administration Hospital at San Fernando on November 17, 1931 because she had received the maximum benefit from hospitalization. Upon discharge plaintiff was given a diagnosis of aortitis, chronic, well compensated, not of syphilitic origin, probably rheumatic, improved, tachycardia simple, which condition was improved on discharge. Under observation on admission for heart disease changed to aortitis, chronic, tachycardia, simple. That was the result of the electrocardiograph and the cardiologist consultation made at Sawtelle. When plaintiff left the hospital her diagnosis was changed from diagnosis upon admission of tuberculosis, chronic, pulmonary, minimal, in-

active, to tuberculosis, chronic, pulmonary, minimal, arrested. She was in the hospital over six months. My first diagnosis was "inactive" and my second diagnosis was "arrested". Generally the Veterans Hospital at San Fernando follows the classification of tuberculosis laid down by the National Tuberculosis Association, and one of the rules of the National Tuberculosis Association is that where one remains quiescent or inactive for a period of six months a change of diagnosis to arrested tuberculosis is justified.

CROSS EXAMINATION

Although I observed her over six months I only gave her exercise for two or three days except the exercise she would get in going out on passes and leaves. I did not examine her immediately after she left when she went out on passes and leaves; I didn't think it was necessary. It is true that the rule of the National Tuberculosis League provides that before a diagnosis of arrested tuberculosis is justified, in addition to observing the patient for six months, the last two months of this six months the patient must have been given an hour's walking exercise twice daily, or its equivalent, and then if the patient shows no symptoms of tuberculosis, then and then only are you justified in making a diagnosis of arrested tuberculosis. That is quite true but this patient, when she came, she was not found active. We don't know how long she was inactive; it might have been active five months or two years before that. We gave her this exercise that is one of the cardinal rules as far as humanly possible, but we didn't want to aggravate the cardiac condition. As far

as the heart was concerned, I left the matter in the realm of considerable doubt, but not as far as the lungs were concerned. I felt satisfied there was an inactive case of tuberculosis. I think I could demonstrate it according to the rule outside of the exervice. She had exercise, not every day; she had exercise going out on passes. I didn't find this heart condition on my first examination; I am not a cardiac man. It might have been there; no doubt it was. It is not a fact that all the specialists of the Veterans Bureau—for instance I specialize in chest and tuberculosis; another man may be a specialist like Dr. Burstien in heart and Dr. Long is a specialist of mental, nervous diseases—tend when examining a patient like that, to usually examine for one thing and that is the thing—his specialty. I gave them a general physical examination but I didn't happen to catch anything on the heart at that time. I am presuming that it was there from the subsequent results. I dare say it is possible that a person can have a heart murmur and a chest man, a specialist on tuberculosis, looking only for tuberculosis, can very easily pass up that murmur. I was looking for pulmonary tuberculosis and I found it inactive. Tuberculosis is considered a progressive disease unless it becomes arrested or inactive. The usual course is to go from incipient, moderately advanced, far advanced if it keeps on. When I spoke of her heart being compensated I am not quoting myself. I am quoting the records and I am not a cardiologist and I don't presume to give an opinion on cardiac conditions. That is why I had others examine her. I recall telling Miss Hill when she complained to me of feeling tired that she would probably be tired for the rest of her life.

(Testimony of Dr. C. H. Mason)

DR. C. H. MASON

testified as a witness on behalf of the defendant by deposition as follows: I am a physician by profession engaged exclusively in X-ray work; I am a graduate of Maryland Medical School, class of 1911; I have been engaged in the specialized practice of X-ray work for approximately 15 years; I know Frances Hill, the plaintiff. Miss Hill early in 1921 was sent to me by the Veterans Bureau as a vocational training student to study X-ray technique; we had her in the X-ray laboratory; I don't remember whether we had her there four or six months. She was a dark haired, rather chunky girl, she wasn't very tall, I don't think, about five feet three or four, rather stout, if I remember correctly, and wore glasses. During the time she worked there she was there practically every day; I don't think the girl ever missed any time at all. It was very evident that she wasn't interested in X-ray work; she didn't particularly care to learn it at all, and, of course, we very soon got the habit of not using her any more, except where necessary. I don't know why the connection between our office and the plaintiff, Frances Hill, was terminated unless she just stayed so long and stopped, it has been so long ago I really don't remember very much about the details of the girl. I do not recall any shortness of breath on her part; I made no actual physical examination of her whatever. We assigned her very little work to do; she broke one of our X-ray tubes, and those things are very delicate, you have to be very careful about anything pertaining to X-ray work, the voltage is high, and unless someone is very much interested in her work and seems desirous of learning the work,

you are very careful about letting them do anything. Our office hours are from around 8:00 to 8:30 until 5:00 in the evening; she was there practically the entire time. She would go out for lunch at noon, one hour for lunch; our office was open six days a week.

CROSS EXAMINATION

The duties she had were not arduous and would be practically no tax on her. I wouldn't say that her apparent indifference may, perhaps, have been due to the listlessness that goes with tuberculosis, to some extent, at least; she didn't give me the appearance of anyone that was suffering from an active tuberculosis or running a fever, or anything of the sort. I made no examination of her at all. I have seen a number of tubercular cases that are fleshy. As to whether she might have performed all of the duties that I and Dr. Cathcart would have required of her in our laboratory and still have had a fairly advanced tuberculosis, I don't think she could have performed the duties we would have required of her, had she been interested in her work, with a well advanced case. She could perform the duties we required of her without any tax whatever on her. The duties we did require was no test of what her physical condition was because we required practically no duties of her; I couldn't say from my observation, such as it was, such as I had an opportunity to make, I wouldn't say she was not suffering from tuberculosis; I made no examination of her at all.

(Testimony of Dr. Ernest B. Thompson)

DR. ERNEST B. THOMPSON

testified as a witness on behalf of the defendant by deposition as follows: I am a physician and a graduate of the Vanderbilt University Medical Department and have practiced my profession continuously for twenty years. Concerning this paper which you hand me, that is a physical examination of Frances Hill, a beneficiary of the Veterans Bureau made by me on August 15, 1921. The paper consists of two pages. I have no personal recollection of the patient. It appears from the evidence in this case that the plaintiff, Frances Hill, was a trained nurse and had worked for the United States Government during the war as such. In my opinion at that time I don't believe she could have followed that line of endeavor, she might have taken a position as secretary to somebody, a clerical position of some kind. I have put my initials on the back of each of those two pages handed me, and labeled them Exhibit "A" and Exhibit "B". (The instruments were received in evidence.)

CROSS EXAMINATION

The date of that examination was August 15, 1921; I haven't examined her since that time; I made just the one examination. I found that she was suffering from a quiescent tuberculosis; I would class it as such. I did not find any moisture in the lungs at that time. Both lungs had been involved; there had been a tubercular infection in both lungs. As to the condition of her heart at that time, this was a special tuberculosis examination, and, if any examination of her heart was made at that time, it was evidently negative, or some note would have been made of it. It might be possible that myocarditis very frequently develops secondarily in a person suffering from

(Testimony of Elizabeth Schmidle)

tuberculosis, from the toxin of tuberculosis, but myocarditis develops from other things more frequently than tuberculosis. Sometimes, it is a fact, it is a complication of a long continued tuberculosis. I don't recall noting any special condition of her heart. I made no examination of the sputum at that time. I do not know whether or not she was running any temperature. I don't remember at what time of day it was when I made that examination. I never treated her, I just made the examination that I was requested to make.

REDIRECT EXAMINATION

I identify the exhibits handed me by my signature.

ELIZABETH SCHMIDLE

testified on behalf of the defendant by deposition as follows: I first met plaintiff at the Miami Inspiration Hospital at Gila County, Arizona, in June or July 1922 when plaintiff was a nurse for that institution; at the time I also worked there as a nurse on general duty. Plaintiff's salary while working at the Miami Inspiration Hospital as a nurse was $85.00 per month; as far as I recall plaintiff's services were satisfactory. I came in frequent contact with plaintiff and as far as I know plaintiff worked every day and was in good health during the period of her employment. I don't know why she left the employment of the hospital. She was not discharged, I remember that. She left of her own free will.

CROSS EXAMINATION

The records of the Miami Inspiration Hospital disclose that plaintiff was employed there around four or five weeks. She quit the employ of her own free will; I don't know why she quit.

(Testimony of Dr. Fred G. Holmes)

DR. FRED G. HOLMES

testified on behalf of the defendant by deposition as follows: I am a physician and a graduate of the University of California and Harvard Medical School, class of 1918; I have practiced my profession continuously since 1918 with the exception of the last eight months during which time I have been sick. I have specialized in diseases of the chest since 1921. I had occasion to examine Frances Hill.

(The doctor was handed what purported to be a photostatic copy of a physical examination and report of Frances Hill, dated February 15, 1923 for the purpose of refreshing his recollection.)

The photostatic copy of report of physical examination reflects my signature and I made a physical examination on February 15, 1923 and I found that she was a well-developed and well-nourished young woman. Her color was good. Her eyes, ears, nose and throat were negative. Normal, that means. The heart was not enlarged, regular, and no murmurs. The abdomen was negative. With particular reference to her chest, which was the thing that was under question, I found her chest to be well-shaped, with normal ability on both sides. The fremitus or reaction to the spoken voice was normal. Her right lung under percussion showed a slight decrease in resonance to the second rib and third vertebral spine. This lung also showed broncho-vasicular breathing and increased whisper over the area described above. There were no rales before or after cough. The left lung at that time showed a slight decrease in resonance at the

apex with a prolonged expiration over the hilus near the sternum and at the apex. No rales were heard before or after cough. My conclusions were that she had a slight old infiltration of both apices, most marked on the right side, without evidence of active tuberculosis at that time. Her weight on examination at that time was 147 pounds. Her normal was 140 pounds. My diagnosis on her was that she had a chronic pulmonary tuberculosis, incipient or minimal, and arrested, with a prognosis which I considered good. At the time I made that physical examination I considered that she could carry on the practice of the profession of nursing; in other words, it was my thought that it wouldn't have any effect upon her health one way or another. (The photostatic copy referred to was marked defendant's Exhibit No. 1 for identification.)

(The doctor was handed what purported to be a photostatic copy of a physical examination and report of Frances Hill, dated July 26, 1923.) I made a physical examination of Frances Hill on July 26, 1923. I found that she was a well-developed and well-nourished young woman apparently not in ill health. The eyes, ears, nose and throat were negative. The heart was not enlarged, regular, and had no murmurs. The abdomen was negative. I stated in my examination that she complained of a rise in temperature in the middle of the morning. I had made my examination of her in the afternoon, and in order to check this rise of temperature in the morning, I made an appointment with her at 9:30 in the morning for several mornings but she did not return. She was supposed to have returned when I could check her temperature at 9:30 in the morning, when she

(Testimony of Dr. Fred G. Holmes)

stated that her temperature was elevated, but she did not appear for her appointment. I found on the examination that with regard to the lungs that her chest was broad and well-shaped, with normal mobility. The fremitus or reaction to the spoken voice was normal. There was a decrease in the resonance to the second rib and the third vertebral spine on the right side, with broncho-vesicular breathing and increased whisper over a like area. There were no rales before or after cough. Over the left lung there was a decreased resonance to the second rib and the third vertebral spine, with an increased whisper over the hilus or root. There were no rales before or after cough. And my conclusions were that there was a slight amount of infiltration over both apices without evidence of activity, and my diagnosis being a chronic pulmonary tuberculosis, incipient, or minimal, arrested. The time of the examination was 4:15 P. M., at which time her temperature was 98.2 degrees Fahrenheit; her pulse, 72 per minute; her weight, 145, as against a normal of, as she stated, 143. That photostatic copy of physical examination and report reflects my signature and I signed that at the time I made that physical examination. (The photostatic copy referred to was marked Defendant's Exhibit 2 for identification.)

(The doctor was handed what purported to be a photostatic copy of a physical examination and report made of Frances Hill October 31, 1923.) I made a physical examination of Frances Hill October 31, 1923 and that physical examination and report reflects my signature. The findings at that time are not in my handwriting, that being a Board of three examiners, all of us examin-

ing, but the handwriting is in one of the other examiners, Doctor—I wouldn't like to state whether it was Dr. Tuthill or Dr. Warner. It was a Board of three in which we all took part in the physical examination and one of the *member* of the Board acted as recorder at that time and we all signed the report. Those findings which are on that physical examination and report are the findings which we made at that time. We found her to be very well developed and nourished. She had a scar of a thyroidectomy, but no symptoms of any hyperthyroidism. There was no other pathology found, no other general pathology. The chest examination showed: A normal shape, normal mobility, normal fremitus; right lung, to percussion, normal; to auscultation, normal; left lung, normal to percussion and normal auscultation. The X-ray findings were made by the laboratory. I did not make the readings of the X-rays, this reading was made from the laboratory. Well, I may omit that then. Our remarks regarding the case were, that if this patient ever had pulmonary tuberculosis, it has left no positive signs; and our diagnosis was, no pathology; the meaning of "pathology" is, well, no diseased process. (The photostatic copy referred to was marked Defendant's Exhibit 3 for identification.)

Referring to Defendant's Exhibit 3 for identification, this Board of three medical examiners who took part in this physical examination and report under date of October 31, 1923 took into consideration the X-ray findings, as well as the physical findings and report. In answer to the question whether the combined X-ray report and the physical findings showed that there was no pathology, we took into consideration the X-ray re-

ports, but, of course, we had the X-ray pictures, which we ourselves looked at, and from which we ourselves drew our own conclusions. We made an independent reading of those X-ray pictures. As to whether we relied upon the laboratory report, it is the invariable rule to read these pictures independently, and we always did that, and we did that in this case. Referring to Defendant's Exhibit No. 2 for identification, it is every bit in my handwriting. Referring to Defendant's Exhibit No. 1 for identification, it is every bit in my handwriting. Referring to each of the three physical examinations which I made of Frances Hill, and the reports which have been marked Defendant's Exhibits 1, 2 and 3, I felt that the occupation of nursing wouldn't have any effect upon the health of Frances Hill at any time during the times those physical examinations and reports were made.

CROSS EXAMINATION

Referring to Defendant's Exhibit 3 for identification, as to whether those findings are my own findings or merely a majority of the three doctors decided on those, those findings are my own findings. I couldn't say if I examined the X-ray pictures myself from which I based my conclusions because I don't recall. I would say what our custom was, and I wouldn't examine a patient without the films, and inasmuch as they were taken I would say that was our custom, but I wouldn't know with reference to this particular case. I don't remember whether I did in this particular case or not. When I first treated Frances Hill, as to the symptoms she had, I will have to refresh my memory because I put those

down in my own handwriting; I would like to have No. 1 if you are going to speak of No. 1, because I have to refresh my memory. I can use each of those to refresh my memory. As to tired feeling, not mentioned; loss of weight, she was more than her normal weight; night sweats, not mentioned; rapid pulse, not mentioned, but her pulse was 72 on examination; loss of appetite, not mentioned; cough, yes; nervousness, not mentioned; weakness, not mentioned; lack of endurance, not mentioned; expectoration, not mentioned; spitting of blood, not mentioned; tickling in throat, not mentioned; hoarseness, not mentioned; pain in chest or shoulders, yes, pains in left side when she caught cold and was tired; malaise, not mentioned; frequent and severe colds, not mentioned; did she have a lung hemorrhage, not mentioned. When I say, "not mentioned," and whether that means that I didn't examine her for those particular symptoms or it just doesn't appear on the report—her symptoms, which were taken from her were: pains in the left side when catches cold, or pains in left side when catch cold or are tired; have cough in the morning. Those were her symptoms. Whether her face was flushed, I don't have it down, of course. She had no sputum. Her afternoon temperature was not taken. I concluded that these pains were pleurisy that she complained of. No effusion. As to whether there was a dullness on percussion, as mentioned in my description there was a slight decrease—I have covered that—"a slight decrease to the second rib and third vertebral spine on the right, and slight decrease at the apex on the left." There was no evidence of a cavity at any place. With all of these symptoms in mind that I have told about at

(Testimony of Dr. Fred G. Holmes)

the time of my examination, in answer to the question would I have advised Miss Hill to rest or would I have advised her to work, I advised her that she could work. I considered that her physical condition was, and so stated on the record, that she was able to work. As to whether she was able at that time to hold a job for a long period of time, or do I have any knowledge of that, I don't know whether she held a job or not; I thought she could. The best treatment for one suffering from active pulmonary tuberculosis is absolute rest.

REDIRECT EXAMINATION

I found no activity; found the case arrested. My answers to the question with regard to the symptoms, that referred only to defendant's Exhibit No. 1 for identification. There were other symptoms mentioned in the others, I think. You asked about only one of them, you see.

RECROSS EXAMINATION

I thought she did not show any signs of active tuberculosis at any time she was under observation. Referring to this list of symptoms generally, she complained of other symptoms on the examination of July 26, 1923, but they were merely complaints.

REDIRECT EXAMINATION

Of the symptoms as set out or read to me by counsel for the plaintiff, many that he mentioned were objective, such as hemorrhaging, temperature, flushed cheeks. However, the others mentioned, such as pain, malaise, are subjective symptoms, and the only way you can find anything about them is by asking the patient. That is what is meant by a subjective symptom.

(Testimony of George A. Simms—Melba Frazer)

GEORGE A. SIMMS

testified on behalf of the defendant by deposition as follows: I am a clerk employed at the Phoenix Indian School Sanitarium at Sixteenth Street and Indian School Road, Phoenix, and as such I have in my possession personnel records pertaining to Frances Hill; I do not know Frances Hill; and the only thing I know about this case is what is contained in those records; I am merely the custodian of those records. After refreshing my recollection from the personnel record (which record was marked Defendant's Exhibit No. 4 for identification) I find the record shows that Frances Hill was appointed January 1, 1923 in a temporary position and that she was separated from the payroll on July 31, 1923; that plaintiff received a salary of $840.00 per annum, plus the bonus of $240.00 during her employment; that in addition to the salary, plaintiff was furnished with a room with heat and lights.

MELBA FRAZER

testified on behalf of defendant by deposition as follows: I am a stenographer employed at the Phoenix Indian School, Phoenix, Arizona, a United States Government institution, and in such capacity am custodian of the personnel records pertaining to plaintiff's employment at that institution between November 8, 1924 and February 21, 1925. Plaintiff received a probational appointment as a trained nurse at the Phoenix Indian School on November 8, 1924, at a salary of $1500 per year with a deduction of $10.00 a month for subsistence; the position to which

(Testimony of Florence L. Hicks)

plaintiff was appointed came under the classified Civil Service, and salary checks in payment of plaintiff's employment were issued in the following order: December 1 to 30, $112.15, deduction for subsistence $2.87; January 1 to 30, $112.13, deduction for subsistence $2.87; February 1 to 21, $78.49, deduction for subsistence $2.01.

FLORENCE L. HICKS

testified on behalf of the defendant by deposition as follows: I have resided in Phoenix, Arizona, since November 1923, and since October 9, 1929 have been registrar for the Nurses' Official Registry, sponsored by the Arizona State Nurses' Association of District No. 1, Maricopa County, Arizona; prior to the time I became registrar for the Nurses' Registry I did private duty nursing in Phoenix, Arizona; I first became acquainted with plaintiff in the year 1926, and I occasionally worked on the same case as plaintiff; at the time of meeting plaintiff in 1926 I was on twelve hour day duty, and plaintiff relieved me working twelve hour night duty on that case; on that paticular case the patient died shortly after plaintiff reported on duty. I worked on several other cases with plaintiff during the period from 1926 until 1929, when I became connected with the Nurses' Registry. Plaintiff worked with me off and on during that period. I remember one year that plaintiff was employed at St. Luke's Hospital for a short time.

Witness produced a written application for employment filed by plaintiff with the Nurses' Registry and said document was received in evidence as defendant's Exhibit F and reads as follows:

(Testimony of Florence L. Hicks)

ARIZONA STATE NURSES ASSOCIATION

District No. 1

NURSES OFFICIAL REGISTRY, Inc.

Phoenix, Arizona.

APPLICATION FOR MEMBERSHIP

(Read registry rules before filling out this blank)

1. Name in full (Miss) Frances Hill
2. Present address 2338 N. 9th St.
   Home address Same
   Telephone Number 32821
3. Year of birth 1894
   Place of birth Batesville, Ark.
4. Height 62-1/2 inches Weight 145
   Religion Protestant
5. Are you married No
6. If married, give maiden name
7. What is the condition of your health? Good
   (a) Have you any physical defects? No
   (b) What communicable diseases have you had? Measels, whooping cough, mumps.
   (c) Have you any tendencies to constitutional or pulmonary trouble? No
8. From what school of nursing are you a graduate?
   St. Vincents Inf.
   Give location Little Rock, Ark.
   Date you finished April 1, 1915

(Testimony of Florence L. Hicks)

(b) Length of course when you graduated? Two years, six months.

(c) Affiliation, if any?

9. Character of hospital: General

10. Daily average number of patients in hospital during training. 250

11. Name of present Director of school of nursing.

12. Name of Director of school of nursing at the time of graduation. Sister Bernard.

13. Postgraduate of what school. Location
Length of course Date

14. Are you a registered nurse? Yes
In what states? Ark., Ariz.
Reg. No. 493

15. State how, where and for what period of time in each instance you have been employed since graduation? Private duty.

16. Has the state in which you graduated registration for nurses? Yes.

(a) Do you agree to apply for registration at the next State Board Meeting?

17. Would you consider an institutional position, if so, state kind and in what locality? No.

18. Will you take all classes of cases? No.

(a) Have you a preference? Yes.

(b) State those that you register against. O. B., D. T., Mental, Barlow-Brown

19. Do you keep a chart on every case? Yes.

(Testimony of Florence L. Hicks)

20. What language, if any, do you speak, besides the English? None.

21. Have you a general understanding of dietetics and general housekeeping? Yes.

22. Name educational institutions attended before entering School of Nursing, state number of years in each, and from which you are a Graduate.

    (b) Have you supplemented this at any time by systematic study? Along what lines?

23. Are you a member of your alumnae? No.
District? No Red Cross? Yes.

24. Do you understand that in signing this blank you accept the rules and regulations of the Registry, the schedule of prices as given in the rules, and that you will give it your loyal support? Yes.

Signature Frances Hill Date: 10-5-29

For registry dues make checks payable to the Nurses Official Registry. For First District dues make checks payable to First District of the A. S. N. A.

Dues for Membership in First District $6.00; dues for the Registry, from Oct. 1st to Oct. 1st, $15.00; payable in advance. From April 1st to Oct. 1st, $10.00; payable in advance. July 1st to Oct. 1st, $5.00; payable in advance.

(Testimony of Florence L. Hicks)

Witness produced a card record from the Nurses' Registry showing cases to which plaintiff was assigned from October 10, 1929 to August 31, 1930, and after refreshing her recollection therefrom testified: On October 10, 1929, plaintiff was assigned on a case at the Good Samaritan Hospital by Dr. Drane. The card record produced was received in evidence as defendant's Exhibit O which record showed the dates of registering and the dates of assignment between October 10, 1929 and August 31, 1930, as follows:

NURSES' OFFICIAL REGISTRY
ARIZONA STATE NURSES' ASS'N.
Dist. No. 1

Date	Patient	Address	Case	Physician
1929				
10-10		Good Sam.	Med.	Drane
10-14	Mrs. Brown	St. Joseph	P. O.	Sweek
10-20	240	" "	Extraction	Borah
10-23	226	" "	Surg.	Tuthill
	To Calif. c pt.			
	To St. Luke's			
1930				
2-7	204	Good Sam.	Accident	Goodrich
2-21	Rhodes	105 W. Merrell	Med.	Drane
2-28	217	St. Jo.	Surg.	Tuthill
4-25	St. Luke's			
5-4	244	St. Jo.	Med.	Koler
6-7	260	" "	Surg.	Smith
6-22	415	Good Sam.	Med.	Bakes
7-18	320	" "	Surg.	Shupe
8-31	Magna Copper Co. Hosp.,		Superior, Arizona.	

1929	Reg.	Ass'gd.	Re-Reg.	Re-Ass'gd.
	10-10	10-10	10-14	10-14
	10-15		10-18	10-23
	10-30		12-30	
1930	1-27	2-7	2-16	2-21
	2-22	2-28	4-20	4-25
	4-25	5-4	5-7	6-7
	6-10	6-22	7-5	7-13
		7-18	7-25	

Prior to the time that I took over the Nurses' Registry in 1929 I worked on several cases with plaintiff in which I would work one twelve hour shift and plaintiff the other twelve hour shift. I usually worked the night shift and plaintiff worked the day shift, inasmuch as I had registered for night duty only. I would estimate I worked on six or eight cases with plaintiff from the time I met her until the time I took over the Nurses' Registry. Plaintiff was never on call for duty by the registry after August 31, 1930. Although I can not remember the exact date, or the year that I last saw plaintiff it was at a bridge party and another woman drove both of us home, and at that time I did not notice anything peculiar about the manner in which plaintiff breathed.

(Testimony of Florence L. Hicks)

At this stage of the trial Government's Exhibits B, C and D were read in evidence as follows:

EXHIBIT B

Date Received
November 26, 1920

Mr. W. F. Doughty,
District Vocational Officer,
Dist. 14,
Dallas, Texas.

Dear Sir:

A. I desire to begin a course of training under Section 2 on Dec. 1st, 1920, provided a medical examination will show my physical condition will permit me to do so, and that my tuberculosis is apparently arrested at that time.

Name Frances Hill
Address Gen. Del. El Paso, Tex.

11/24/20

I have this day been examined for Vocational Training, Dr's report is that I have been arrested case for some time.

Frances Hill

(Testimony of Florence L. Hicks)

EXHIBIT C

NONAPPORTIONED SERVICE

PREFERENCE BEING ... Form 2418 Aug., 1923 ... PREFERENCE ... AVERAGE PERCENTAGE ... APPLICATION NUMBER ... SELECTION NUMBER 268653

UNITED STATES CIVIL SERVICE COMMISSION

APPLICATION FOR EXAMINATION

NOTE.—The applicant must ... ALL blanks in the ... below ... Failure to do so may prevent examination.

Kind of examination: Graduate Nurse	Residence: State of Ark
Place of examination: Newport (City.) Ark (State.)	County of
Date of examination: May 23-24, 1924	Date of birth: Jan 4 1888 — Age on last birthday, 35
(Places and dates of examinations are given in announcements.)	Height 5 ft. 2½ in. Weight 15? lbs.
(The address given below will be treated as the applicant's post-office address until notice, in writing, of any change is received.)	APPLICANT WILL NOT FILL THE FOLLOWING.
(PRINT first name in full, middle initial or initials, if any, and surname in full. If a woman, prefix Miss or Mrs. Use same name EXACTLY as signed at the end of this application, inside.)	Application ... approved ..., 192
Name (Miss) Frances Hill	By whom ... approved ... 5/22/24
Number and street	Admitted to examination ..., 192
City, Town, Post office: Newport	Notified of standing Aug 18 1924
State or Territory: Ark	Entered register ..., 192

78 ans

NOTICE TO APPLICANTS.—Any false statement in an application, or alteration of a voucher or certificate, or the presentation to the Commission of a paper containing such false statement or alteration, is a violation of the law and punishable as such.

IMPORTANT INSTRUCTIONS.

1. Use this blank only when specified in examination announcement.
2. Answer ALL questions fully in ink.
3. Remember that ALL your answers are under oath.
4. Avoid reference to religion, politics, or fraternal orders.
5. There must be no discrepancy in statements made, or in manner of writing your name throughout application and in "Officer's Certificate."

TO THE UNITED STATES CIVIL SERVICE COMMISSION, WASHINGTON, D. C.:

I, the undersigned, hereby apply to be admitted to the examination named above, intending to accept appointment if selected.

1. Are you a citizen of the United States?	Date of birth (give month, day, and year)? Applicants can not be examined unless U. S. limits. The answers to these two questions must be consistent.	Age on LAST birthday? citizens and within proper age	Place of birth? (Foreign-born citizens must prove citizenship. If native, show State or Territory; if foreign born, show country.)
Yes	Jan 4, 1888	35 years	Batesville Arkansas

NOTE. It is important that Questions 2 and 3 be fully, yet concisely, answered. If more space is required, an additional sheet may be used, but it should be securely fastened to the second page of this form. In answers to questions relative to time, give dates and periods of time in years and months as accurately as possible.

2. (a) In the space below, give a detailed statement of your education, including dates:

Grammar school.		High school.			College or university.			
Years 1894 to 1901		From 1901 to 1903			From No			
Name and location.	Highest grade completed.	Name and location.	Highest grade successfully completed.	Did you graduate? (Answer "Yes" or "No.")	Name and location.	Number semester hours credit received.	Degrees conferred.	Major subject.
Newport Ark	8th	Newport, Ark	10th	No				

(b) If you have pursued any postgraduate courses of study, state fully what studies and when, where, and for what length of time they were pursued ...

3. Submit a complete statement of your experience. State when (with dates), where, and by whom you were employed, the compensation received, and the specific nature of your duties in each case. Every line of work in which you have been employed must be included in your statement.

Graduated from St Vincents Inf. Training School for nurses Little Rock ark. 1915. April 11, 1916 private duty nursing for Drs A. H. Kirby, J. P. Runyan W. H. Miller of Little Rock ark. Salary 6.00 per day, till March 23-1918 went into U. S. army spent 7 months over seas in A. N. C. Salary 70 per month and board and laundry for the past two years I have done general Hospital nursing 7 months under Dr A. J. Whitlea Phoenix ariz. 90 per month 7 months under Dr F. R. Winslow Douglas ariz. 90 per month

4. (a) What is the lowest entrance salary you would be willing to accept? $90. per month

(b) Would you be willing to accept temporary appointment? yes — If so, at what salary? $60. per month

(Testimony of Florence L. Hicks)

EXHIBIT C (Continud)

2

5. Have you now or have you ever had any of the following disabilities? (Answer "Yes" or "No" to each inquiry; in case answer is "Yes" describe fully under question 6.)

Sore eyes or any defects of vision in either eye?	No	Fallen or misplaced arch of foot impairing efficiency?	No	Rheumatism?	no	Are you subject to headache—severe, protracted, or frequent?	no
Any defects of hearing in either ear?	No	Tuberculosis in any form?	Suspect	Paralysis?	no	Convulsions or fits?	no
Any trouble in hearing ordinary conversation readily?	No	Asthma or shortness of breath?	No	Piles?	No	Nervous exhaustion or mental derangement?	no
Any defect of speech?	No	Any chest, lung, throat, mouth, or nasal disease?	Bronchitis	Rupture?	No	Palpitation or any disease of the heart?	no
Any injury, deformity, or defect of hand, arm, foot, or leg?	No	Any skin eruption?	No	If ruptured, is rupture retained by well-fitting truss?	No	Dyspepsia?	no
		Tumors, sores, ulcers, enlarged veins?	No	Difficult urination; immoderate flow of urine; bladder or kidney disease?	No	Do you wear glasses?	yes

6. Describe fully here all diseases, disabilities, defects, or infirmities which you now have or may have had in the past. If suffering from same at present, so state; if not, state when and for what length of time.

Suspect T.B. following "Flu" 1918. Compensation from Government discontinued last Sept. 1922. No symptoms during past year.

7. (a) Were you ever in the U. S. military or naval service? (Answer "Yes" or "No," and see note below) yes

In what company and regiment, or on what vessel, or where else? (Do not give service in militia.) Army Nurse Corps

Give exact name under which enlisted and discharged. (Miss) Frances Hill

7. (b) Date of each enlistment and [illegible] or naval service.

	Enlisted March 28, 1918	Enlisted ......, 1......	Was enlistment in each case terminated by honorable discharge? (If answer is "No," state how.)
	Discharged ......, 1......	Discharged ......, 1......	
Enlisted ......, 1......	Enlisted ......, 1......	Enlisted ......, 1......	
Discharged ......, 1......	Discharged Feb. 3, 1919	Discharged ......, 1......	yes

NOTE.—If you are the widow of a soldier, sailor, or marine, and were not divorced from him, and have not remarried since his death, or if you are the wife of a disabled soldier, sailor, or marine, fill out the answers to Questions 7a and 7b to show the service of your husband.

An honorably discharged soldier, sailor, or marine should submit his certificate of discharge or a photographic or certified copy thereof, unless he has already been allowed preference by the Commission, in which case he should submit the notice of allowance of preference. If the applicant has been pensioned or compensated, or has received training under the Veterans' Bureau, he must also submit his certificate to that effect. Papers submitted will be returned.

8. What has been your place of abode and principal business or occupation for each of the past four years?

Year 1920	Year 1921	Year 1922	Year 1923
Place of abode El Paso, Tex.	Place of abode El Paso Tex.	Place of abode Globe, Ariz.	Place of abode Phoenix, Ariz.
Occupation Private Nursing	Occupation X-Ray Work	Occupation Nursing	Occupation Staff Nursing

9. Are you now in the employ of the U. S. Government? (Answer "Yes" or "No.") No. If your answer is "Yes," state where and in what position ......

10. (a) Were you ever employed in any branch of the U. S. Government? (Answer "Yes" or "No.") yes

(b) If employed, was your appointment permanent or temporary? Temporary

If employed, either permanently or temporarily, fill in the answers to the following questions concerning each period of your employment by the Government:

In what department or service were you employed?	In what city or town were you employed?	Dates of employment.	Did you voluntarily resign?	Were you discharged?
U.S. Army Nurse Corps	Little Rock, Ark., Liverpool England	From March 28, 1918 to Feb. 3, 1919	yes	yes
		From ......, 1...... to ......, 1......		

11. (a) Have you ever filed an application with this Commission or its representative for any branch of the U. S. Government service? No

(b) If so, give information indicated regarding each examination.	Name each position for which examined or for which application was filed.	In what city were you, or are you to be, examined?	Give the date of each examination. (Month and year.)	Did you pass? (Answer "Yes" or "No.")
	No			

(If you passed only one part of the combined stenographer and typist examination, indicate in above answers the part in which you passed.)

12. Have you ever been barred from examination by this Commission?	If so, when and for what reason? (Give the date, place, and kind of examination for which you applied and in connection with which you were barred.)
No	

13. Have you ever been discharged from a position under the U. S. Government or under a State, county, city, or local government, or from private employment? No

If so, state where and when you were employed and give the name and address of your employer and the reasons for your discharge in each case. No

14. (a) Have you ever been arrested or charged with any offense against law or police regulations; or have you ever forfeited collateral, or been fined or convicted on account of any misdemeanor or offense? (Answer "Yes" or "No.") No

(b) Does your answer to (a) above cover all cases therein referred to? (Answer "Yes" or "No.") yes

Untruthful answers may result in debarment from examination. The fact that an applicant has been arrested, indicted, or convicted may not cause the disapproval of his application. If your answer is "Yes," name the offense and include with the application an abstract of the court proceedings in each and every case sufficient to show the action taken, and also, in case of conviction, whether fined, imprisoned, or released, furnish a statement from the trial judge or other court officer showing the surrounding circumstances and your reputation. This question does not include proceedings against a child in a court acting in such case as a juvenile court.

15. (a) State in each case whether or not you have ever used any of the following, and, if so, to what extent:

Whisky	No	No	Beer	No	Opium, morphine, or other narcotic drug	
Wine	No	No	Other intoxicating liquors	No		No

(Testimony of Florence L. Hicks)

EXHIBIT C (Continud)

16. Give the names and addresses of five persons, preferably employers, who have knowledge of your character, experience, and ability.

	NAMES.	ADDRESSES.
(1)	Dr. W. H. Miller	Little Rock, Ark. 7th & Izard St.
(2)	Dr. J. P. Runyan	1st. Lucas Bldg. Little Rock, Ark.
(3)	Dr. J. W. Eldridge	Fabrite Barnes Bldg, Fort Worth, Texas
(4)	Dr. E. L. Langford	Dane, El Paso, Texas
(5)	Dr. A. J. Wheeler	East Forn Dane, Phoenix, Ariz.

17. (a) Are any members of your family or relatives (either blood or by marriage) in any part of the U. S. Government service whatsoever? (Answer "Yes" or "No.") No

If so, furnish the information required below in regard to all such relatives.

Name.	Post office address.	Position and department or office in which employed.	Relationship.	Married or single.
	Street and No.	Position		
	City or town	Department or office		
	Street and No.	Position		
	City or town	Department or office		
	Street and No.	Position		
	City or town	Department or office		

(b) Does your answer above cover all your relatives in the U. S. Government service? Yes

(c) Indicate here which, if any, of the persons named above are temporarily employed

(d) Indicate here which, if any, of the persons named above live in the same house with you

(e) Indicate here which, if any, of the persons named above are less than 21 years of age

18. In what State or Territory have you actual bona fide residence?	Length of such residence therein? (Residence must be shown up to date of jurat.)	In what county have you actual bona fide residence?	Length of such residence in county? (Residence must be shown up to date of jurat.)
Newport Ark.	From May 1, 1924 (Month.) (Year.) to May 24, 1924 (Month.) (Year.)	Jackson Co.	From May 1, 1924 (Month.) (Year.) to May 25, 1924 (Month.) (Year.)

19. If you have not resided continuously in the State or Territory in which you claim actual bona fide residence, or are not now actually living in such State or Territory, answer the following questions fully. (If more space is required, attach statement to application.)

(a) For what periods have you been absent therefrom, giving dates?
From 1-1-19 I went to El Paso Texas. Since that time I have only spent a few months at a time in Newport Ark, but Newport Ark is my home

(b) Where were you and what was your occupation during such time?
El Paso Texas. Nursing & X-Ray work
Globe Ariz. Nursing
& Phoenix Ariz. Nursing

(c) What are your intentions as to returning to the State or Territory in which you claim actual bona fide residence?
I came at the place I call my home

(d) What are the facts on which you base your claim to actual bona fide residence in the State or Territory claimed?
My Mother, brothers and sisters live here and I own the State

(e) What is the name, address, and relationship of the person, if any, with whom you make your home at the present time in the State or Territory in which you claim bona fide residence?
Brother, J. E. Hill

(f) Are you now a voter in such State or Territory? (Answer "Yes" or "No.") Not

(g) If you are under 21 years of age, give the actual bona fide residence and the post office address of your parent or parents, or your guardian:

Bona fide residence of parents or guardian.	Length of such residence.	Post office address.
County, State.	From (Month.) (Year.) to (Month.) (Year.)	City or town. County, State.

20. Are you now married? (Answer "Yes" or "No.")	Were you ever married? (Answer "Yes" or "No.")	If a married woman, where is your husband's actual bona fide residence? (Name county and State.)
No	No	

I solemnly swear that the answers I have made to each and all of the foregoing questions are full and true, to the best of my knowledge and belief. So HELP ME GOD.

If female, prefix "Miss" or "Mrs."

(Signature of applicant.) Miss) Frances Hill
(Sign your first name in full, your middle initial or initials, if you have any, and your surname in full.)

NOTE.—Your name, EXACTLY as above, and post-office address must be PRINTED in the space therefor on the first page of this blank. Failure to do so or to attach sufficient postage to the envelope when forwarding your application may prevent your examination. If you write to the Commission later, or when signing declaration of appointee, if appointed, use same name EXACTLY.

Do not omit Jurat or Officer's Certificate (if required) on page 4. Medical Certificate not required unless called for in announcement.

(Testimony of Florence L. Hicks)

EXHIBIT C (Continud)

4

THIS APPLICATION WILL NOT BE ACCEPTED IF THE JURAT OR OATH, OR THE OFFICER'S CERTIFICATE, WHEN REQUIRED, IS OMITTED.

JURAT, OR OATH.

[Under the provisions of the civil service act and rules, an application for examination must be made under oath, in such form and manner and accompanied by such certificates as the Commission may prescribe. The following oath may be taken at any place in the United States most convenient to applicant, before any NOTARY PUBLIC, or other officer authorized to administer oaths for general purposes, and before whom the applicant must appear in person and make oath to all the statements made by him in his application. THE OFFICER'S SIGNATURE MUST BE AUTHENTICATED BY OFFICIAL (IMPRESSION) SEAL. If the oath be taken before a justice of the peace or other officer who has not such seal, his official character must be certified by the clerk of court, secretary of state, or other proper officer, under official seal.]

Subscribed and duly sworn to before me according to law by the above-named applicant, this 29th day of May, 1924, at Newport, county of Jackson and State [or Territory or District] of Arkansas

(Signature of officer.) Eugene E. Wallace

[OFFICIAL IMPRESSION SEAL.] (Official title.) Notary public

The OFFICIAL SEAL MUST NOT BE OMITTED ON "JURAT" unless the officer who executes the jurat is an officer of the county or city claimed by applicant as residence and executes the "Officer's Certificate," in which event, if the seal be impressed on the "Certificate" it need not be impressed on the "Jurat." (See Officer's Certificate following.)

OFFICER'S CERTIFICATE.

This certificate is required of applicants for positions in the apportioned Departmental Service at Washington, D. C.

This certificate must be executed by a notary public, county, municipal, or police court clerk, mayor, justice of the peace, or other officer in the county or city in which the applicant claims residence, provided the officer has an official (impression) seal, or, in lieu thereof, that his official character is certified to by proper officer, under official (impression) seal, and provided he is an actual resident and officer in the same county or city claimed by the applicant.

Applicants who occupy positions in the apportioned Departmental Service at Washington are not required to have this certificate executed but should make the following notation opposite it: "Am in the apportioned Departmental Service."

The applicant is not required to appear in person before the officer who executes the following certificate, but the officer should satisfy himself as to facts to which he certifies, from credible and competent evidence.

I, a Notary public (Official designation of officer.), of the county of Jackson and State [or Territory] of Arkansas, do hereby certify that Frances Hill (Write name to agree exactly with applicant's signature.) the applicant, who signs the above application for civil service examination, is now an actual bona fide resident of the county of Jackson, and State [or Territory] of Arkansas and has been such resident for Since May 1st 1924 years months next preceding the date hereof.

Dated at Newport, county of Jackson, and State [or Territory] of Arkansas, this 29th day of May, 1924

[OFFICIAL IMPRESSION SEAL.] (Signature of officer.) Eugene E. Wallace

The official seal must not be omitted. Any addition or alteration in the printed wording will nullify the certificate.

If erasures or corrections be made in "Officer's Certificate," certification must be made on margin by the officer who executes the certificate showing such correction.

My commission expires Jan 14 1928

MEDICAL CERTIFICATE.

This medical certificate is required only when the examination announcement so specifies. The certificate must be filled out by some qualified physician after a thorough examination of the applicant.

Height (without shoes) 5 ft 7½ inches. Weight (without clothing) 138 pounds.

(Measurements to be made by physician.)

Describe any defects in eyes, hearing, speech, heart, lungs, hernia, or other physical condition, and report whether they would interfere with the duties of the position sought.

Is applicant physically and mentally able to perform the duties of the position sought?

I certify that I have made a thorough examination of the applicant named herein, that such and all of the above answers are in my handwriting and are true, and that the applicant made his signature in my presence.

(Signature of physician.) [illegible]

Date 5-26

(This space to be filled in by the applicant in own handwriting, in the presence of the physician.)

(Testimony of Florence L. Hicks)

EXHIBIT D

UNITED STATES OF AMERICA
GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered 1-1 to 1-4 inc., 2-1 to 2-4, inc., 3-1 to 3-4, inc., 4-1, 4-2, 5-1, 5-2, 6-1 and 6-2, are true copies of the official documents now on file in the General Accounting Office in the following case:

Accounts of John B. Brown.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 17th day of July, in the year 1935, at Washington.

(SEAL)

R. N. Elliott
Assistant Comptroller General
of the United States.

EMPLOYEES AT PHOENIX INDIAN SCHOOL
Phoenix, Arizona.

Certified for increase of compensation during the fiscal year, 1923

Name	Position	Salary	Effective Date of increased Compensation
Hill, Frances	Nurse	$840.	Jan. 1, 1923.

(Testimony of Florence L. Hicks)

I recommend the employees named in the foregoing list for increase of compensation during the fiscal year 1923, as provided by law, and hereby certify that they possess the ability and qualifications which justify their receiving such increases. I further certify that they possessed such ability and qualifications on dates shown, or at the time of their entrance upon duty, if subsequent to that date.

Feb. 5, 1923.

John B. Brown
Superintendent

Certificate issued February 27, 1923,
Bureau of Indian Affairs
General List I. O. No. 25
Item No. 22

PAYROLL OF EMPLOYEES EMPLOYED AT THE PHOENIX INDIAN SCHOOL

Name	Occupation	Time Employed	Amount Paid
Hill, Frances	Grad. Nurse	Jan. 1 to Mar. 31	$245.00
		Apr. 1 to June 30	$245.00
		July 1 to July 31	$ 81.66
		Sept. 16 to Sept. 30	$ 57.50 After Ded. Sub.
		Oct. 1 to Oct. 31	$115.00 After Ded. Sub.
		Jan. 1 to Jan 31.	$112.13 After Ded. Sub. and Retirement.

(Testimony of Dr. E. Payne Palmer)

DR. E. PAYNE PALMER

testified on behalf of the defendant by deposition as follows:

I have resided in Phoenix, Arixona, for the past 36-1/2 years; that he is a surgeon and have practiced my profession continuously since April 13, 1898; I am a graduate of Barnes Medical College, St. Louis, Missouri. I first made a physical examination and treated plaintiff professionally on April 20, 1927; upon my examination the major findings were chronic gall bladder inflammation, and a chronic appendix inflammation; plaintiff had a mild fibrosis, or scarring in the lungs and a colitis. The lung scarring indicated a healed condition from some disease process, and the colitis usually results from some disturbance of the digestive tract when it occurs along with a chronic appendix or gall bladder and appendix inflammation. Inasmuch as plaintiff had both a chronic gall bladder and appendix inflammation I concluded that those conditions were responsible for the colitis. I recommended to plaintiff that she have an operation for the removal of the appendix and the gall bladder, if she felt that her symptoms were severe enough to justify the operation. I operated on plaintiff on April 25, 1927, at the Good Samaritan Hospital, Phoenix, Arizona, and removed her appendix and gall bladder. A general anesthetic was administered to plaintiff consisting of nitrous oxide to start, after which ether was used. I was present the entire time during the administration of the anesthetic. In my examination of plaintiff I ordered laboratory examinations of the blood, gall bladder, the digestive tract, and a uranalysis was made; a physical examination and X-ray

examination was made of the chest. The operation took about an hour and ten minutes which included the time to anesthetize, preparatory to the operation. Plaintiff made a very satisfactory recovery and advised that she was well enough to go home after remaining in the hospital six days, following the operation. They usually stay in the hospital two weeks for that type of operation. As to whether I would administer a general anesthetic in connection with a surgical operation where one had a lung condition would depend upon the degree of the lung involvement.

CROSS EXAMINATION

I personally examined the X-rays made of plaintiff's chest, and also accepted the opinion of the radiologist in arriving at my conclusion that the X-ray showed mild fibrosis in the lungs. In making my examination of plaintiff's chest it consisted both of a stethoscopic examination and X-ray findings; plaintiff's heart was listened to through the stethoscope to determine the sounds and its size; an X-ray was ordered of the lungs particularly because her case history showed that she stated she had had a cough at one time. I do not recall that she was coughing at the time of the examination. I was assisted in my examination and operation by Dr. Brockway, at the request of plaintiff. In the examination of plaintiff's chest I did not discover anything wrong with her heart.

REDIRECT EXAMINATION

So far as my examination of plaintiff, her heart was normal at the time I examined her.

At this stage of the trial the following proceedings took place:

MR. FOOKS: As I stated before, there are seven other depositions which I understand it has already been stipulated they are deemed to have been read in evidence.

THE COURT: The depositions which have been taken on behalf of the plaintiff but have not been introduced in evidence by her shall be deemed to have been introduced on behalf of the defendant and read it into the record.

MR. FOOKS: And they may be referred to by either side in the argument or summing up.

MR. GERLACK: You are referring to the relatives, a sister and brother-in-law.

THE COURT: The depositions, the list of which was given to me yesterday.

MR. FOOKS: Not all relatives, by the way; Dr. McGill and three or four others.

THE COURT: These different exhibits are deemed to have been read into the record, as I understand it, or are you going to take time now.

MR. FOOKS: No, I was going to save time now, because they are quite lengthy.

The testimony of the witnesses in the depositions above referred to are as follows:

(Deposition of Dr. A. G. McGill)

The deposition of

DR. A. G. McGILL

taken on behalf of plaintiff was read in evidence by the defendant as follows:

My name is A. G. McGill; my profession is a physician and surgeon; I am a graduate of Tulane University and have practiced my profession at Little Rock, Arkansas, for more than twenty-five years; I have specialized in X-ray and laboratory diagnosis. In February, 1919 after plaintiff's discharge from the Army Nurse Corps, with other physicians, I made a physical examination of plaintiff, including the examination of her sputum and her chest, and I X-rayed her chest. The examining physician found a general tubercular bacilli in the sputum and spots of consolidated lung on both sides, and a very large heart. Plaintiff's pulse was fast and her blood pressure was low; she had moist rales. The examining physicians made a diagnosis of tuberculosis, slight activity, and her heart disease; it was the opinion of the examining physicians that the prognosis was not good. Rest, diet and change of climate was prescribed as the treatment for plaintiff. At the time of my examination in February 1919, a record of the examination was made and someone had procured it two, three or four years ago. After plaintiff had gone to El Paso and remained there for two or more years she came back to Little Rock for several months when I again saw her; at the time of her return to Little Rock her tuberculosis was supposed to have been arrested, but she got bad again and had to go back to a dryer climate; upon her return to Little Rock from El Paso her heart was not any better than it was in

(Deposition of Dr. A. G. McGill)

February 1919. After February 1919, the last time I saw plaintiff was when she returned to Little Rock from El Paso, three or four years later.

At the time I saw plaintiff at St. Luke's Hospital in February 1919, I was the X-ray and laboratory man and believed plaintiff was a patient of Dr. Kirby's, but the plaintiff's case was discussed at a staff meeting. There was a finding of tuberculosis made within thirty days after plaintiff's discharge from the service.

CROSS EXAMINATION

Witness was shown a photostatic copy of a letter dated June 21, 1933, which is a true copy of an original letter prepared by him and bearing his signature. The said letter was marked as Exhibit A and attached to his deposition and reads as follows:

Little Rock, Arkansas

June 21, 1933

COMES A. G. McGILL AND ON OATH STATES:

That he is a regular physician, graduate of Tulane, 1906, duly licensed and practicing in Little Rock, Pulaski Co., Arkansas, offices in McGill Clinic Building, 505 Rock St;

That on January 20, 1919, he examined Miss Frances Hill, a former Nurse in St. Lukes Hospital, Little Rock, Arkansas, at the time of examination recently discharged from the Army;

That a mitral murmur was heard and that the x-rays revealed a large heart;

(Deposition of Dr. A. G. McGill)

That Miss Hill was not able to do nursing on account of the above conditions.

A. G. McGill

Subscribed and sworn to this 22nd day of June, 1933.

(SEAL) Jno. S. Gatewood,
Notary Public.

My commission expires 3/3/34

After the witness had the opportunity of reading Exhibit A identified as a letter prepared by him on June 21, 1933, the following proceedings took place:

CROSS EXAMINATION

BY JUDGE HENDRICKS

Q We note it does not say anything about tuberculosis. How does it happen that that was not mentioned?

A Well, it was possibly an oversight by whoever copied the record.

Q The only trouble mentioned in that report is what?

A Heart disease.

Q Does it reflect a serious condition?

A Yes.

Q How serious?

A No better than heart disease. As bad as that condition or worse.

* * *

Q Was there anything about her condition that would reflect that she couldn't follow some other profession for

(Deposition of Dr. A. G. McGill)

which she was qualified like stenographic work or performing office work?

A Well, she might do that.

* * *

Q Now, at the time you examined this lady the second time, which was several years after she first went west, what state was her tubercular condition in at that time?

A She was still like she was at first.

Q I understood there was a recovery.

A It was supposed to have been arrested. She had to go back on account of a cough. I sent her back to the doctor that said she was arrested.

Q It is true that one in that condition can live in the west in some climate and maintain an arrested condition that couldn't live here in Arkansas?

A Yes. He may be able to live out there and not be able to live here.

Q You don't know what her condition was after she went back the second time?

A No, I don't. I have had several letters from her since that time. She said she was about the same.

Q What was her heart condition when you made the last examination?

A About the same.

Q About the same as several years before?

A Yes.

(Deposition of Berniece Ready)

The deposition of

BERNIECE READY,

taken on behalf of the plaintiff, was read in evidence by the defendant as follows:

I am a resident of El Paso, Texas, and have been acquainted with plaintiff since 1921; the period of my acquaintance with plaintiff extends from June 1921 to April 1922, and plaintiff and I had an apartment together for four months. I observed that plaintiff was not able to stand exertion or hard work, and appeared to tire easily. During my acquaintance with plaintiff she had ordinary colds and touches of flu, but I do not remember plaintiff coughing so much. Plaintiff was active socially, but never went to parties where there was dancing, except a few times, as dancing caused her to become very short of breath.

CROSS EXAMINATION

When plaintiff was not working she would usually remain in her apartment and rest until about 5:00 P. M. in the evening when she would dress and meet me at the post-office which was approximately six blocks from the apartment, and we would walk home together. Plaintiff earned from $4.00 to $5.00 a day when she worked.

REDIRECT EXAMINATION

I slept with plaintiff all the time that we had an apartment together and was careful about drinking after her because I had just lost a husband who had tuberculosis, and I wondered sometimes if plaintiff was tubercular.

(Deposition of Dr. Frank J. Malloy)

RECROSS EXAMINATION

Plaintiff while working as a nurse sometimes worked at night and sometimes in the day time; the nurses at that time were required to work twelve hour shifts.

REDIRECT EXAMINATION

I have not seen plaintiff for five years.

The deposition of

DR. FRANK J. MALLOY,

taken on behalf of plaintiff, was read in evidence by the defendant as follows: I am a physician by profession, and a graduate of Northwestern University; that I have practiced my profession for fourteen years and specialized in internal medicine, and *has* administered medical aid to persons suffering from tuberculosis. I first met plaintiff in 1926, and have treated her on various occasions between 1926 and 1931. When plaintiff came to me for treatment she gave me a history extending back from the time she was in the Army, and that history was that she had had acute respiratory attacks, consisting of pleurisy, temperature, pains in the chest and cough at infrequent intervals, and that she usually had several attacks during the winter months, but was fairly well during the summer months. It is possible that I saw plaintiff from 1926 to 1931 on an average of two or three times a year, during which time she had attacks such as I have described; that on some of these occasions plaintiff had severe attacks of pleurisy. Plaintiff's subjective symptoms were pains in the chest, general feeling of malaise, spells of tempera-

ture, loss of appetite, loss of weight, and frequent colds. From plaintiff's symptoms and history I have always felt that plaintiff had pulmonary tuberculosis, and I made such a diagnosis. I have always considered that her prognosis should have been good, if she had taken the proper care of herself. I mean by taking care of herself that she should have followed the regular treatment for pulmonary tuberculosis, consisting of rest in bed until all symptoms had completely subsided. I would not have advised her to continue her occupation as a nurse during that time. I did advise plaintiff to have a thorough examination, including X-ray and sputum and blood tests, and after that sanitarium care, consisting of regular rest in bed and hygienic procedure.

CROSS EXAMINATION

The occasion for my becoming acquainted with plaintiff was that she was suffering from acute cold and respiratory affections and consulted me for treatment. To my knowledge plaintiff was following the occupation of trained nurse in 1926, but I do not remember exactly when she stopped nursing. Plaintiff did not follow my advice, except during her acute attacks which attacks lasted from several days to several weeks. I always felt plaintiff's prognosis was good, if she had the proper treatment for the necessary period of time; that plaintiff never had hemorrhages, and in my opinion at the time of her attacks she was having acute exacerbations of chronic low grade, pulmonary tuberculosis.

(Deposition of Dr. C. R. Swackhamer)

The deposition of

DR. C. R. SWACKHAMER,

taken by the plaintiff was read in evidence on behalf of the defendant as follows:

I am a physician by profession and a graduate of Rush Medical College, and have practiced my profession since 1913. I first met plaintiff September 1, 1930, when I examined her chest; that plaintiff's subjective symptoms were shortness of breath on exertion, pain in the region of the left shoulder and front of left upper chest, and occasionally an abnormal temperature of one or two degrees.

As far as the chest is concerned I made no finding, except possibly a little enlargement of the aorta in the left upper chest. At the time of my examination I considered plaintiff's prognosis to be fair, nothing serious, provided she did not attempt to do too much work. I did not make a record of my examination, but the reason for the examination, was that plaintiff was complaining a little. I looked over her chest and took an X-ray picture of it. Plaintiff was under my care for one or two days in February 1931, when she was in bed and not feeling well; plaintiff was not under my care again until March 1, 1931. Plaintiff was head nurse at the hospital with which I was connected, but that her work was not heavy and she did her work all right. After an X-ray was taken of plaintiff's chest I concluded that she had a slight enlargement of the heart, chronic aortitis and chronic myocarditis. I recommended that plaintiff rest and have a blood test made.

(Deposition of Dr. C. R. Swackhamer)

CROSS EXAMINATION

Plaintiff worked for me from the first of September 1930, for a period of sixteen or seventeen days, and then left on account of the death of her brother. Plaintiff returned to work the first of October 1930, and continued to work steadily until February 1, 1931. Plaintiff left on February 3, 1931, and returned to work on March 1, 1931 for two days. Plaintiff received $100.00 per month with board and room, while employed by me; that her work was satisfactory and that she was receiving pay for the work she performed and for no other reason.

At this stage of the trial the following proceedings took place:

MR. FOOKS: I don't believe this was offered in evidence. It was offered in the deposition of Mr. Sexson which we did not read, and that is, the hospital record at the Good Samaritan Hospital.

MR. GERLACK: We will waive objection and stipulate that they go in evidence.

THE COURT: It is now admitted in evidence as Government's Exhibit I.

This report of the physical examination and the operation record of Dr. E. Payne Palmer is as follows:

ARIZONA DEACONESS HOSPITAL
Phoenix, Arizona.

Physical Examination.

Case No. 761

Name: Miss Frances Hill Dr. E. P. Palmer Date 4-25-27

Working diagnosis: After physical examination—Chronic cholecystitis and chronic appendicitis.

Physical findings: Head, Neck, Chest, Cardio-Vascular, Abdomen, Genito-Urinary, Skin, Bones and Joints, Glandular, Neuro-muscular.

General: Expression one of discontent. Skin sallow.

Head & Neck: Eyes react normally to light and accomodation. Tongue slightly furred. Nose, throat, tonsils and teeth normal condition. No glandular adenopathy. No thyroid enlargement .

Chest: Normal. Heart normal position. Apex beat in the fifth interspace, heart sounds are normal. Lungs show moderate amount of fibrosis on X-ray. No abnormal sounds in lungs. No rales.

Abdomen: Tenderness under right costal margin with some muscle rigidity, of right rectus. Tenderness over lower portion of right rectus, especially marked on deep pressure.

Neuro-muscular: Normal Cholocystogram shows retention of dye in Gall Bladder after thirty-six hours. Appendix not visualized. Tenderness in right iliac region on fluoroscopic examination. X-ray diagnosis was chronic cholecystitis and chronic appendix.

Examined by E. Payne Palmer.

OPERATION RECORD

Surgeon is Responsible for all Data on this page.

Name Miss Frances Hill Location 203 Admission No. 761

Pre-operative Diagnosis (reasons for operating) Chronic appendicitis and cholecystitis

E. Payne Palmer
Surgeon

Operation Appendectomy & cholecystectomy Date 4-25-27

Finding, Normal and Abnormal Four inch incision into upper portion of right rectus, under local and gas anesthesia. It was necessary to use almost every type of anesthetic to anesthetize this patient. Appendix, adherent, post cecal, schlerotic at distal three-fourths. Gall bladder thickened. Large amount of fat subperitoneal. Liver showed moderate amount of sclerosis radiating from Gall Bladder. Other abdominal organs are negative. Appendectomy and cholecystectomy with drainage.

Immediate Post-operative Condition (Hemorrhage, Shock, etc.) Good.

Post-operative Diagnosis Same

Correct	E. Eddington	Miss Sanders
Sponge Count	Instrument Nurse	Run Nurse

Dr. E. P. Palmer
Surgeon

Dr. Brockway
First Assistant

At this stage of the trial the following proceedings took place:

MR. FOOKS: I would like at this time, your Honor, to read one medical report in evidence which I don't believe has been covered as yet. You will recall I went up to 1926; then I didn't cover 1931 altogether, that is, just partially. I presume counsel will permit me to read from this transcript to save time.

MR. GERLACK: I have no objection. I will stipulate, if you want, that that go in evidence.

MR. FOOKS: I think that might be a good idea. There are no objectionable matters in it. In other words, the things that are in it are proper.

THE COURT: Then we will mark it as a Government's exhibit.

MR. GERLACK: I think it would be of material assistance to the jury instead of having to go through these numerous medical reports. I think counsel has been very fair in getting what belongs in there and leaving out what doesn't.

MR. FOOKS: As the jury will review this in the jury room, I see no reason for reading from the examination of '31.

THE COURT: It may be marked as Government's Exhibit P.

Government's Exhibit P, which is a summary of medical reports made by Government physicians, is as follows:

SUMMARY OF GOVERNMENT MEDICAL EVIDENCE

12–19–19 Dr. J. E. Huffman, Surgeon, U. S. P. H. S. Service, Tucson, Ariz.

Physical Examination: Dullness, decreased breath sounds left lower lobe, friction rub same area.

Diagnosis:

Pleurisy with adhesions.

Doctor's Conclusions:

Does not advise resuming occupation of nurse. Not bedridden—able to travel. Will accept hospital care, if necessary—hospital care not advised.

4–7–20 Dr. J. W. Tappan, Surgeon USPH Service, El Paso, Texas.

Physical Examination:

Reveals roughening over larger bronchi

Diagnosis:

Bronchitis, chronic

Doctor's Conclusions:

Does not advise resuming occupation of nurse. Not necessary to remain in bed —able to travel.

Claimant does not desire hospital care—not advised.

Claimant has a major vocational handicap. Vocational training not feasible.

5–13–20 Dr. W. E. Vandevere, Surgeon USPH Service, El Paso, Texas.

Physical examination:

Roughening over larger bronchi

Diagnosis:

Bronchitis, chronic

Doctor's Conclusions:

Does not advise resuming occupation of nurse.

Not bedridden—able to travel.

Does not advise hospital care—claimant will not accept.

Claimant has a major vocational handicap.

Vocational training is feasible and recommends that claimant be allowed to take vocational training.

6–7–20 Dr. W. E. Vandevere, Surgeon, USPH Service, El Paso, Texas.

Chest examination:

Lungs: Shape of chest—full

Has not lost weight.

Chest measurements: Inspiration 38 inches, expiration 35 inches.

Did not detect any pathological condition in chest except roughening over larger bronchi.

Rate of respiration: 26

No haemoptysis.

Heart: No valvular lesion detected.

8–4–20 Dr. Ernest B. Thompson, Surgeon, USPH Service, El Paso, Tex.

Physical examination:

Claimant extremely well developed and nourished. Chest full and expansion good. Some slight roughening over the larger bronchi, otherwise chest negative.

Diagnosis:

Bronchitis, chronic.

Doctor's Conclusions:

Claimant able to resume former occupation as nurse and advises that she do so.

Not bedridden—able to travel.

Hospital care not advised though claimant will accept, if necessary.

Vocational handicap minor at present—training is feasible.

8–16–20 Dr. J. W. Tappan, Surgeon, USPH Service, El Paso, Texas.

Physical examination:

Claimant well developed and nourished; chest full and expansion good. Evidence of hyper-plastic pleuritis, left base, with some post-influenza rales, which may possibly be tuberculous. Fibrosis right lobe, upper, especially posteriorly. In view of report of X-ray findings we have hesitated to give this claimant a diagnosis of tuberculosis though the present examiner feels sure that this should have been done long ago. X-ray report made

by Dr. J. W. Cathcart under date of 6-29-20, is as follows:

Lungs: Hilus shadows rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side.

Conclusions:

Markings not typically tuberculous.

Diagnosis: Bronchitis, chronic tuberculosis, chronic pulmonary.

Doctor's Conclusions:

Claimant not able to resume former occupation as nurse. Should be in bed part of time—able to travel.

Hospital care advised and was transferred to USPHS Hospital #55, Ft. Bayard, N. M.

Vocational handicap major — vocational training not feasible.

After careful consideration of all physical findings in this case writer felt that diagnosis of tuberculosis should have been given previously.

8–22–20 Dr. J. J. Beatty, USPHS Hospital #55, Ft. Bayard, N. M.

Physical examination:

Inspection: Looks well, well nourished and developed, no chest deformities, expansion appears good and equal on both sides.

Palpation: Slight decreased tactile fremitus both lowers.

Percussion: Decreased resonance above 2nd rib and 3rd ds. spine both sides, also both bases.

Auscultation: Increased vocal resonance above 3rd and 4th ds. spine right, and above 3rd rib and 3rd ds. spine left. Broncho vesicular breathing above 2nd rib and 3rd ds. spine both sides. Diminished breath sounds at both bases. No rales heard.

Diagnosis:

Pleurisy, chronic, fibrinous both bases.

Doctor's Conclusions:

Claimant not able to resume former occupation as a nurse at present.

Not bedridden—able to travel.

Hospitalization advised for observation—claimant will accept.

Vocational handicap major at present—vocational training not feasible at present.

10–21–20 Dr. C. W. Coutant, Surgeon USPHS Hospital #55, Fort Bayard, N. M.

Statement:

"This is to certify that Miss Frances Hill, now a patient in this Hospital is an arrested case of Pulmonary Tuberculosis, and physically able to accept vocational training."

10–22–20 Dr. C. W. Coutant, USPHS Hospital #55, Fort Bayard, N. M.

Physical examination:

Inspection: Chest broad and well nourished. No depressions. Palpation: Tactile fremitus increased on right, not more than normal. Percussion: Rt. impaired resonance below 5th ds. and below 3d rib in mid-axillary line. Lt. Impaired resonance above 2d rib and 3d ds. Auscultation: Rt. Diminished breath sounds base with slight friction rub, mid-axillary line. No rales. Lt. Diminished breath sounds at base. No rales.

Diagnosis:

Under observation for tuberculosis pulmonary, chronic. Pleurisy, chronic, fibrinous both bases.

Doctor's Conclusions:

Claimant not able to resume former occupation as nurse. Not bedridden—able to travel. Hospitalization advised—will accept. Claimant has a major vocational handicap—vocational training is feasible.

11–6–20 Dr. W. E. Vandevere, Surgeon, USPHS, El Paso, Texas.

Physical examination:

Inspection reveals claimant robust, well developed and nourished. Palpation and percussion negative. Auscultation reveals broncho-vesicular breathing at right apex

and increased vocal resonance about fourth rib and fifth dorsal spine right lung. A few clicks upper lobes, each lung. No rales in either lung. X-ray report by Dr. Cathcart is as follows: Lungs: Hilus shadows rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side. Conclusions: Markings not typically tuberculous." Roughened breathing over larger bronchi.

Diagnosis:

Tuberculosis, pulmonary, chronic (arrested)

Bronchitis, chronic.

Doctor's conclusions:

Claimant not able to resume former occupation

Not bedridden—able to travel

Does not advise hospital care, but will accept if necessary.

Has a major vocational handicap—recommends vocational training as being feasible.

11–25–20 Dr. W. E. Vandevere, USPH Service, El Paso, Texas.

Physical examination:

Inspection reveals claimant robust, well developed and nourished. Palpation and percussion negative. Auscultation reveals broncho-vesicular breathing at right apex

and increased vocal resonance about fourth rib and fifth dorsal spine right lung. A few clicks upper lobes, each lung. No rales in either lung. X-ray report by Dr. Cathcart is as follows: "Lungs:—Hilus shadows rather heavy and contain large number calcified glands. Apparently some scar tissue scattered throughout right side. Conclusions: Markings not typically tuberculous". Roughened breathing over larger bronchi.

Diagnosis:

Tuberculosis, chronic pulmonary (arrested)

Bronchitis, chronic.

Doctor's Conclusions:

Claimant not able to resume former occupation

Not bedridden—able to travel

Hospital care not advised—though claimant will accept.

Has a major vocational handicap, but vocational training is feasible.

8–23–21 Dr. Ernest B. Thompson, Surgeon, USPH Service, El Paso, Texas.

Physical Examination:

Chest: Shape: Full, deep and broad. Mobility Good. Palpation: Fremitus, Negative. Percussion: R. Lung negative; Left lung, negative; Auscultation R. Lung: Slight increase in voice and

breath sound at apex; broncho-vesicular breathing same place. No rales before or after cough. L. Lung: Posteriorly just above the scapula there is a small area of granular breathing.

Summary: Fibrosis upper right apex and upper left posteriorly.

Diagnosis:

Tuberculosis, chronic, pulmonary, moderately advanced, arrested.

Doctor's Conclusions:

Believes claimant can resume pre-war occupation. Not bedridden—able to travel. Hospital care not advised. Has vocational handicap but vocational training is feasible.

1–10–22 Drs. W. T. Doherty and P. E. McChesney, Surgeons USPH Service, El Paso, Texas.

Physical examination:

Well nourished. Temperature 98.3 Pulse 80.

Eyes: Corrected by glasses.

Ears, Nose & Throat: Negative.

Heart & Abdomen: Negative.

Extremeties: Negative.

Chest: Shape: Well formed. Mobility: Expansion about equal & symmetrical. Palpation: Fremitus negative. Percussion: R. Lung: Slightly impaired resonance apex to 2nd rib. L. Lung: Normal Auscultation: R. Lung: Marked

broncho-vesicular breathing and exaggerated voice at apex; no rales before or after cough. L. Lung: Normal.

Summary: Fibrosis right apex.

Diagnosis:

Tuberculosis, chronic, pulmonary (arrested)

Doctor's conclusions:

Claimant able to resume pre-war occupation as a nurse. Not bedridden and able to travel.

Hospital care not advised.

Has a vocational handicap but vocational training is feasible.

2–15–22 Dr. Fred G. Holmes, Att. Specialist T. B. Phoenix, Arizona.

Physical Examination:

Well developed and very well nourished young woman. Color good, eyes, ears, nose and throat negative. Heart—not enlarged, regular no murmur. Abdomen negative. Chest: Shape: Well shaped, mobility normal. Percussion: Right lung: Slight decrease 2nd and 3rd s. L. Lung: Slight decrease at apex Auscultation: R. Lung: Broncho-vesicular breathing and increased whisper 2d & 3d s. No rales before or after cough. L. Lung: Prolonged expiration over hilus near

sternum and at apex. No rales before or after cough. Summary: Slight old infiltration both apices most marked on the right without evidence of activity.

Diagnosis:

Tuberculosis, chronic, pulmonary, incipient, arrested.

Doctor's Conclusions:

Claimant able to resume her former occupation as nurse; Not bedridden—able to travel—no hospitalization recommended; has a slight vocational handicap; vocational training feasible.

7–5–22 Dr. W. W. Horst, Globe, Arizona.

Physical Examination:

Well nourished and developed, slightly roughened breath sounds in left thorax posteriorly. Chest: Shape symmetrical; mobility good; Palpation: Fremitus normal; Percussion, right and left lungs: Good resonance; auscultation negative right lung; left lung: Slight inspiratory roughening in left base posteriorly.

Diagnosis:

Chronic Pulmonary tuberculosis, incipient, quiescent.

Doctor's Conclusions:

Claimant able in part to resume occupation as nurse; Not bedridden; able to travel; has vocational handicap in part; but vocational training feasible.

7–26–23 Dr. Fred G. Holmes, Phoenix, Arizona.

Physical examination:

Well developed and very well nourished young woman. Is not apparently ill. Eyes, ears, nose and throat negative. Heart: Not enlarged, regular, no murmurs. Abdomen negative. This patient complained of a rise in temperature in the middle of the morning. As I always found her normal when I saw her in the afternoon I made an appointment with her for 9:30 A. M. several mornings but she never returned. Chest: Broad, well shaped; mobility normal. Palpation: Fremitus: Normal: Percussion: R. Lung: Decreased 2d rib and 3rd. s. L. Lung. Decreased 2d rib and 3rd s. Auscultation: R. Lung. Broncho-vesicular breathing and increased whisper 2d rib and 3rd r. s. No rales before or after cough. L. Lung: Increased whisper over hilum. No rales before or after cough.

Diagnosis:

Tuberculosis, chronic, pulmonary, incipient, arrested.

Doctor's conclusions:

Claimant able to resume her former occupation; not bedridden, able to travel; vocational training feasible.

8–27–23 Dr. R. D. Kennedy, Globe, Arizona.

Physical examination:

Temperature 10:00 A. M. 98.6—general examination negative; Chest: Shape, full; mobility normal; palpation, percussion and auscultation normal. Summary: Infiltration in hylus of both lungs as shown by X-ray. Left pleura slightly thickened

Diagnosis:

Pulmonary tuberculosis, incipient, arrested.

Doctor's conclusions:

Claimant able to resume former occupation; not bedridden; able to travel; hospital care not advised; Claimant has no vocational handicap; vocational training feasible.

10–31–23 Drs. Fred G. Holmes, A. M. Tuthill and A. R. Warner, Phoenix, Arizona.

Physical examination:

Very well developed and nourished. Scar of Thyroidectomy. No symptoms of hyperthryroidism. No pathology found. Chest exam: Apices slightly hazy—heart and diaphragm shadows normal. Hili shadows enlarged with moderate bilateral infiltration—both lower and left upper bronchial trees are thickened—small cavity described in previous report in upper left

lobe not visible in this examination. X-ray conclusion: Possible perihilar tuberculosis. If this patient ever had pulmonary tuberculosis it has left no positive signs.

Diagnosis: No pathology

Doctor's Conclusions:

Claimant able to resume her prewar occupation as nurse. Not bedridden—able to travel. Hospital care not advised. Vocational training is feasible.

2–27–24 Drs. L. H. Fales, L. A. Walker and J. T. Malone, U. S. Veterans Hospital, Phoenix, Arizona.

Physical examination:

OUT PATIENT. Looks well, well developed and well nourished. Color good. Weight 161 lbs. Temperature 37. Skin and mucous membrane negative. Vascular system negative. Blood pressure not taken. G. U. System negative. Osseous system negative. Pulse 92. Glandular system negative. Heart negative. Abdomen negative. Nervous system negative. Muscles and joints negative. Urine negative. Sputum: No specimen. Eye, ear, nose and throat report: Vision O. U. 20/30, corrected to 20/20 by glasses. Hearing A. U. 20/20. No pathology found in nose and throat. Chest: short, broad, thick. Palpation, percussion negative. Auscultation. R. Lung: Broncho-

vesicular breathing (slight) over apex posterior. Few atypical crepitations this area. L. Lung: Breath sounds apparently normal. No rales. Pleural crepitations at base. No parenchymal infiltration either lung. Surgical report: Thyroidectomy 1917, healed.

No surgical condition at present.

X-ray of chest 2-28-24 by hospital Roentgenologist: Films good. Stero well. Bones negative. Right diaphragm smooth; costo-phrenic angle clear. Left diaphragm hazy; costo-phrenic angle not shown on film. Tracha and heart negative. Hila increased in density with caseous and calcified nodules at each. The upper lobe bronchi both right and left are slightly heavier than normal; their borders are studded. Linear markings cannot be traced to the surface. The right main stem bronchus shows some connective tissue change.

Summary: Fibrosis both upper lobes.

Diagnosis:

Tuberculosis, pulmonary, chronic, arrested, incipient (A).

Doctor's Conclusions:

Claimant able to resume prewar occupation as nurse. Not bedridden—able to travel. Hospital care not advised. Vocational training is feasible.

8–17–26 Drs. Theodore E. Shwarz and Wm. C. Schroeder, Phoenix, Arizona.

Physical examination:

General appearance: Plump, looks well. States that she has acute coryza.

Head and neck: Eyes — fitted with glasses. Ears negative. Thyroidectomy 1917. Parts of gland still palpable. Teeth good. Tonsillectomy 1919.

Heart: Pulse sitting 78, standing 90. No adventitious sounds, no bruit, or thrills, rythm very susceptible to external irritation, pulse increases on slight exertion. Probably a "nervous heart" a sequella of hyperthyroidism. Abdomen: No scars, no masses, no tenderness. Extremities negative.

Chest: Broad, lung full, mobility restricted with lagging in lower left. Palpation: Fremitus negative. Percussion: R. Lung: Dullness above 4th rib and 5 s. L. Lung: Dullness over lower lobe and above 2 rib & S. S. Auscultation: R. Lung: B. S. B. V. above 2 rib & S. S. when W. V. S. are increased. No rales.

L. Lung: B. S. B. V. above 2 rib with S. S. WVS distant Friction rubs over lower lobe. No rales.

Summary: Fibrosis both uppers, thickened adhesions pleura lower left.

Diagnosis:

Chronic pulmonary tuberculosis, moderately advanced, non-active. Chronic fibrous pleurisy.

Doctors' Conclusions:

Claimant not bedridden—able to travel. Hospitalization not advised.

2–6–31 Drs. J. T. McDonald and R. C. Foster, Phoenix, Arizona.

Physical examination:

Normal weight. Skin negative. EENT negative.

Neck: Thyroid enlarged; once had vessel ligated.

Heart: 72 to 84 sitting; 96 standing. Has sharp decisive 2nd sound in aorta carried into the neck. No other abnormal tones noted. Area cardiac dullness (see x-ray). Mitral tones are normal.

G. I. Gall bladder and appendix removed.

Extremities: Negative.

X-ray of Heart: Greatest transverse diameter of chest—31 cm. Greatest transverse diameter of heart 14 cm. Transverse diameter of aortic arch—6 cm. The heart outline suggests possibly a slight left ventrical enlargement but the heart measurements are well within the normal limits. This reading is from a chest film.

X-ray of chest; Conclusions: Minimal fibrosis uppers, slight; peribronchial thickening base.

Diagnosis:

Tuberculosis, pulmonary, minimal inactive. Bronchitis, chronic, mild.

Doctor's Conclusions:

Claimant not bedridden, able to travel. Observation to determine diagnosis not necessary.

2–17–31 Opinion of special Tuberculosis Board consisting of Drs. R. C. Foster, J. T. McDonald, and A. J. Hoskins, Phoenix, Arizona.

"The undersigned Board of Three Medical Officers have carefully reviewed the file of the above captioned. In accordance with the Provisions of Reg. 215, it is our opinion that:

1. The claimant has suffered active tuberculosis of a compensable degree.
2. Tuberculosis has reached complete arrest.
3. Tuberculosis was completely arrested 10-31-23".

3–26–31 Drs. J. T. McDonald and R. C. Foster, Phoenix, Arizona.

Physical examination:

Blood pressure 145/80. Pulse 84/96/120 —after exertion remains at 96 reclining 5 minutes. Left ventricle shows a pro-

longed soft mitral tone, not transmitted, not carried into the aorta. Has marked dyspnea. Rate and dyspnea believed influenced by both overweight and thyroid with moderate hyper-tension. (referred to x-ray: Negative)

No diagnosis.

Doctor's Conclusions:

Claimant not bedridden able to travel. Observation to determine diagnosis not recommended.

4–3–31 to 4–17–31 Drs. C. P. Harrod, J. H. Mallery, and J. J. Klein, Veterans Administration Hospital, San Fernando, Calif.

Physical examination:

White female, well developed and well nourished. Chest is medium length, broad and thick. Mobility good and equal. Head and neck: See EENT and Dental reports. Thyroid palpable. Had operation for ligation of both thyroid arteries in 1916. Skin is clear.

Scars: Healed P. O. scar anterior across neck, result of operation for legating both thyroid arteries in 1916. Healed P. O. scars on abdomen. G. U. system negative. Menstruation regular and normal. Rectum, slight hemorrhoids, ext.

non symptomatic (patient's statement). Abdomen: Liver and spleen not palpable.

Physical examination continued:

No masses or tenderness elicited on palpation. There is a healed P. O. scar about 6 inches long extending along right rectus muscle for removal of gall bladder and appendectomy in 1927. Patellar reflexes present. Heart: PMI in 5th interspace in left mid clavicular line. Heart action rhythmical. No murmurs heard. Rate slightly accelerated. Blood Pressure 140/90. Basal metabolism recommended.

X-ray of chest: Negative for active tuberculosis the right base suggests possible old basal infection. The transverse diameter of the heart is shown to be 14cm. M. M. 9.5 Cm. M. R. 4.4 C. M. The aortic area is 6.2 Cm. These markings would be considered within normal limits for patient of this size and weight from possibly the aortic area which is moderately increased.

Diagnoses:

Tuberculosis, chronic, pulmonary, minimal inactive. Pleurisy, chronic, fib. not found. Hemorrhoids, external, mild, non symptomatic Under observation for Heart dis-

ease changed to Tachycardia, simple (per electrocardiograph).

Doctors' Conclusions:

Basal metabolism recommended. Claimant not bedridden—able to travel.

5–19–31 Dr. Frank L. Long, N. P. Specialist, Los Angeles, Calif.

Mental examination:

* * There is an old, fine thyroidectomy scar that is not adherent or tender and there is a noticeable enlargement of the thyroid gland at this time. The gland is not tender or nodular. There is no exophthalmos, Dalrymple, Moebius or Von Graefe sign. The pulse rate today is 78. Blood Pressure is 154/90.

Doctor's Conclusions:

My impression is that her complaint of fatigability is not due to a psychoneurosis and not due to a thyrotoxicosis. As none if found at this time, I do not believe that hospitalization is necessary for a neuropsychiatric condition.

Normal pulse rate with normal Basal Metabolism test would indicate that there is no thyrotoxicosis present at this time.

5–29–31 Drs. C. P. Harrod, A. G. Walker and J. J. Klein, Veterans Administration Hospital, San Fernando, California.

Physical examination:

White female, well developed and well nourished. Chest is medium long, broad and thick. Mobility good apparently equal. Head and neck: Thyroid palpable. Had operation for ligation of both thyroid arteries in 1916. Skin is clear. Scars: Healed post operative scar anterior across neck result of operation for ligating both thyroid arteries in 1916. Healed post operative scars on abdomen.

Physical examination continued:

Abdomen: Liver and spleen not palpable. No masses or tenderness elicited on palpation. There is a healed post operative scar about 6 inches long extending along right rectus muscle for removal of gall bladder and appendectomy in 1927. Patellar reflexes present.

Heart: PMI in 6th I. S. in the mid clavicular, no murmurs heard over mitral area. Aortic 2nd sound rather markedly accentuated and a systolic murmur of aortic valve increased upon exercise.

Blood pressure: Recumbent 150/98; after exercise 150/88; three minutes after exercise 142/84. Pulse recumbent 96. After exercise 120; three minutes after exercise 96.

Diagnosis:

Aortitis, chr. well compensated, not syphilitic, probably rheumatic.

Tuberculosis, pulmonary, chronic, minimal, inactive;

Tachycardia, simple.

Hemorrhoids, external, mild, non-symptomatic.

Doctors' Conclusions:

Claimant bedridden: No. Able to travel. Recommendation: Thirty days further hospitalization with resistive exercise according to McDills method.

11–17–31 Drs. C. P. Harrod, A. G. Walker, J. J. Klein and H. M. Fine, Veterans Administration Hospital, San Fernando, California.

Physical examination:

Essentially the same as examination of May 29, 1931 except as follows:

Heart: Palpation negative. PMI 5th interspace internal to nipple line. No

murmurs at this point. There is a short systolic murmur heard best on this examination just to the left of the sternum in 3rd interspace. Aortic 2nd accentuated and heard better after exercise. Pulse reclining 68; sitting 80; 3 minutes after exercise 72. Blood pressure: Reclining 138/90; sitting 130/80; 4 minutes after exercise 136/ not obtained.

Basal Metabolism minus 2.

Diagnosis:

Tuberculosis, pulmonary, chronic, minimal, arrested;
Aortitis, chronic, well compensated;
Tachycardia, simple
Arterial hypertension, not found.
Pleurisy, not found
Hemorrhoids, ext. mild, non-symptomatic
Presbyopia, uncorrected.

Doctor's Conclusions:

Patient examined 11-17-31 by a Board of three medical officers as having reached maximum benefit and further hospitalization not needed.

At this point defendant rested, and plaintiff proceeded to put on her evidence in rebuttal.

PLAINTIFF'S CASE IN REBUTTAL

FRANCES HILL

recalled to the stand as a witness on her own behalf testified in rebuttal as follows:

I heard Dr. Mason in his deposition state that I broke an X-ray tube. I didn't break the X-ray tube. I hadn't used it that day—he was the only one that had used it. There was a controversy or unpleasantness on account of breaking that tube. There was no unpleasantness on Dr. Cathcart's part because Dr. Cathcart knew I didn't break it. But Dr. Mason was only in training, the same as myself.

Concerning the records, Mr. Crosher, the man from the Pacific Mutual Life Insurance Company, who brought the records up here showing that I purchased two so-called annuity bonds—explaining the circumstances under which I took out these bonds and whether I was given a physical examination in connection with them. I took them out on my brother's advice. I knew the agent that sold these bonds. She was a personal friend of mine, a lady, Miss Larson, and my brother knew something of those bonds and he made the payment himself. Had they produced all the records they would have produced that my brother, James H. Hill, a real estate broker of Newport, Arkansas, paid $150 as the first payment through a check that was made to me and endorsed by me and turned over to Miss Larson, and that was the first payment. My brother made the subsequent payments himself. He sent two different checks for $100 each. Different people cashed those checks for me, but this one, it seems to me, the Pacific Mutual should have a record of it. That was not the only time

my brother sent me money. My brother sent me money every month, no certain amount due to the fact that one month I might need more than I did other months.

At various times I went back to Arkansas to visit my mother. My brother wired me the money. He sent it or wired it always for me to go back and visit my mother. My brother is not living now. He was killed September, 1930. I had been back there six months before he was killed and he wired the money to me in March. I had been back there and he wired $200 for me to make the trip. None of the money that went for the purchase of that annuity bond came from any money I earned.

I heard Mrs. Schmidle, in her deposition, say that she thought I left the Miami Copper Hospital of my own free will. That is not correct. I left because I was not able to do the work. I resigned by request.

Concerning Dr. Holmes' statement in his deposition that I was supposed to go back the next morning for an examination and that I didn't show up—he said three mornings. I don't know anything about that. I was sick in bed. I was not able to go back. I did my best to send him word. I had the matron to call him. Neither Dr. Holmes nor Dr. Thompson nor any other Government doctor ever observed me for six months and give me two months' walking exercise, one hour, twice daily, in connection with any examination they ever made of me; I never had that test in my life. Outside of the time I was in the Fort Bayard Government Hospital and the San Fenando Government Hospital the longest time that any of these doctors who made reports here ever took to examine me, I would say, was 15 minutes. They never had me undress. They always unfastened the neck

of my dress. They listened to my chest with me sitting down.

The hardest job I have ever had since discharge I believe was the Indian School. The reason why that was the hardest—you see, I was supposed to teach the Indian School, the eighth grade children, home nursing, and this husky voice, of course, would become weaker from me trying to teach them. I couldn't do that. It was very hard on me. I would have to go to bed every time I had a class.

CROSS-EXAMINATION

When I answered the question of Mr. Gerlack that each time the Government doctor examined me, except during those two periods of hospitalization, they only examined me for 15 minutes, I didn't take into consideration the different times they made X-rays—because the doctor's didn't make the X-rays. An X-ray only takes about less than a minute and a half. They made X-rays of me at different times. I am speaking now that the doctor himself who examined me only took 15 minutes but the X-ray was apart from that. It was not even in the doctor's office.

I don't recall who I made beneficiary of those bonds in case that I should have died while they were effective. It might have been my mother, I really couldn't say. If the record showed it was my estate that would probably be correct. The friend of mine who negotiated that bond transaction was Miss Larson. When I first took out these bonds there was a note made for some time, but the first payment, I recall, a check for $150 written on the First

(Testimony of Frances Hill)

National Bank of Newport, Arkansas, by my brother. I recall the time when I endorsed that check and turned it over to her. Now the different little details of those bonds I couldn't say, but I do recall the check. Recalling the bond that I first took out, the one in 1924 that I gave a note due in April, 1925, for $171.13, the bond was taken out while I was at the Indian School. That was the latter part. I took it out and made a note and paid that note before Christmas. I recall Miss Larson coming there to see me and it was before Christmas time. That was the first payment—that must have been—yes, that must have been. I couldn't recall the details. I recall the check that made the payment. I don't recall giving her a note which I paid at some later date, but if the records show that I did, I did.

REDIRECT EXAMINATION

I got the money to pay for the gall bladder operation from my brother. I had no other place to get it. My brother gave me $200 for that. During the time, you see, I was sick in bed. I had a woman taking care of me for six weeks before this gall bladder operation. Dr. Brockway was treating me at that time. I only went to Dr. Palmer to consult him as a surgeon. I got the money for it—I borrowed on these annuity bonds. The X-ray that I had to have because the X-rays are around $100 and I borrowed this money on the bonds, which was never paid back.

The examinations that were given to me by the physicians in the employ of the Government were very brief. I remember that detail due to the fact that they were very brief. In 1923 I wrote to the Government Bureau

complaining that these examinations were brief. I recall writing a letter to the Veterans Administration Headquarters, General Hines, at that time in San Francisco. I believe it was General Hines. I recall writing a letter to the Veterans Administration in Washington. Before that time I had written the Phoenix Veterans Bureau. I believe it was in 1923 that I wrote a letter to the Government complaining about the shortness of time of the medical examinations given me. I recall writing three different letters complaining; they were written in 1923; one might have been written the winter of 1924. I wrote the first letter probably in August, 1923—the latter part of the summer. I would not say for sure, but I believe that was the time. It was in July, 1923, that I quit this position at the Indian Sanitarium. The name of the doctor whose examination I made complaint about was Dr. Holmes. I wrote one letter to General Hines in San Francisco. I wrote one to the Veterans Bureau in Phoenix. I believe that was the first one I wrote. It might have been in August. I wrote to General Hines during the fall some time. I know I wrote a third letter about the latter part of 1923. I also wrote a letter to Senator Carl Hayden from Arizona during the winter of 1923 and the early part of 1924. I remember writing one letter to the Women's Overseas League in San Francisco some time during that winter—1923-24. I can't give you the date. I wrote letters—to the Veterans Bureau in Phoenix; General Hines, in Washington; Senator Carl Hayden;

(Testimony of Frances Hill)

Women's Overseas League; I don't recall any more. I am relying solely upon my recollection. I have some letters at home from Senator Carl Hayden that would refresh my memory, but I have nothing here with me.

After all this correspondence I took a job at the Indian School beginning in the fall of 1924. Dr. Duncan gave me the regular routine examination when I went to the Indian School. The age of the youngest children at that school was six years, I believe. I believe that is the rule; and their ages range from six to about twenty. At that time that I was residing in Arizona, beginning with January, 1923, from that time on, I had a bank account in the First National Bank of Phoenix. When I was in Globe I had a little bank account while I was there in 1923. When I left Dr. Wheeler's place I went to Globe to rest because it is cooler up there, and I had a bank account. I don't recall the name of the bank in Globe. Anyway, it wasn't the Valley Bank. The Valley Bank is the most popular bank. Throughout the period I was residing in Arizona my brother remitted money to me in varying sums, at least once a month. I don't recall that he ever missed a month sending me money of some amount. Sometimes it was more than others, according to my needs. I don't recall him ever sending me less than $50 a month. Some months he sent me more than $50, but there wasn't a month, so far as I can remember, while I was living in Arizona that he failed to send me at least $50.

(Testimony of Frances Hill)

In 1923, during this period that I had this job at the Indian Sanitarium from January 1, 1923, to July 31, I was receiving $80 a month besides my room and board. Concerning the $50 a month, at least, that my brother sent me during this period, I did different things with it. I had a bank account during that time, and at different times when I wasn't working I had to pay somebody to take care of me, which was quite expensive at times. During that period I was living at the Indian Sanitarium. I wasn't paying anybody to take care of me during that time. I had two weeks sick leave, or vacation, I don't know which they called it, and during that time I did spend it in bed and had my meals served to me. That was the latter part of my stay there. In other words, some time in July, 1923, I was absent about two weeks in private care.

On the basis of a minimum of $50 a month, that would mean that from January 1 to July 31 my brother had sent me at least $350. I didn't keep a record or recall for what purposes I used that amount of money—what I did with it. I do know when I gave up my work I paid a woman's expenses to drive me to Globe, where it was cooler, and there I remained in the hotel until she found an apartment, and part of that money was spent for that. My brother was my only source of income at that time, and she found an apartment for me, she got me placed in the apartment and a woman to take care of me.

(Testimony of Frances Hill)

In the fall of 1924 I took this position at the Indian School at a salary of $125 a month less $10 a month for my keep. I was furnished a room plus $115 a month net. I testified it was my recollection that I kept that job, at least I was on the payroll of that job until the February following—it was between four and five months I was there. The money that I got from my brother and from the Indian School I paid on these bonds, these income bonds, on his advice. The first remittance on account of these bonds was a check from my brother in the amount of $150; the first payment on the bonds was a check from my brother for $150. All the little details about it I don't recall. About the other $50 a month—well, sometimes I had little debts to pay when I wasn't working. I would owe people different little debts. I don't recall just what I did with every dime of it, but I do recall that it was his seemingly intention to pay for these income bonds for me in case he was not so progressive later. I continued to receive at least $50 a month from my brother until he passed away in September, 1930. As to whether in addition to that I was working, say at least 13 cases from October, 1929, until August, 1930—it could have been 13 days. I am not saying it was. Some were longer, but I never worked a long time during that time, and at different times when I wasn't working I had a woman to take care of me, and the expenses sometimes were more than others. During this period while I was doing private nursing between 1923 and 1930, some of the jobs were what they call twelve-hour shifts.

At this stage of the trial the following proceedings took place:

THE COURT: Now, then, gentlemen, we are about to complete the evidence in the case, and as part of that evidence, it has been stipulated that between February 14, 1919 and June 30, 1923, the plaintiff received a total of $1371.46 from sources other than—or, in other words, in addition to any money derived from her earnings, and any moneys derived from relatives and friends; that in addition, she received $148.39 on October 22nd, 1926, from such outside sources having nothing to do with her earnings or her relatives or friends; and that from and after October 1926, until after the commencement of this lawsuit she also received $50 per month from sources other than her earnings and other than from relatives and friends.

Now, this evidence is admitted solely with reference to the question as to whether the plaintiff was obliged to work by reason of any financial necessity or whether in whatever work she did do the same was performed for reasons other than financial necessity. At this time the evidence is closed, and—

* * *

THE COURT: I want to make one additional statement which is part of this stipulation:

That in addition to these sums that I have mentioned, the plaintiff also received a subsistence allowance in the sum of $100 per month during the period that she was engaged in vocational training; that was approximately seven months during the year 1921.

At this point plaintiff rested.

At this stage of the trial the following proceedings took place:

MR. FOOKS: If the Court please, at this time I would like to move for a directed verdict on the ground that the plaintiff has failed to sustain the burden of proof by substantial evidence, and I submit that as a matter of law she has failed by a fair preponderance of the evidence to establish permanent and total disability on or prior to midnight of August 31, 1919, as required before she is entitled to judgment. Defendant bases its motion and submits that if a verdict should be rendered in favor of the plaintiff, that upon proper motion made it would be the duty of the Court as a matter of law to set aside the verdict and declare a mistrial.

The Court denied defendant's motion and the defendant noted an exception to the ruling of the Court.

Whereupon the cause was argued by respective counsel, and the cause was submitted to the jury.

After due deliberation the jury returned into the Court and rendered the following verdict:

"*Judgment*: We, the jury in the above entitled cause, find for the plaintiff, Frances Hill, and fix the date of her permanent and total disability from following continuously any substantially gainful occupation, on January 1, 1919.

"Dated: Los Angeles, California, December 11, 1936.

(Signed) Mark H. *B*arrington,
Foreman of the Jury."

Whereupon on the 18th day of December, 1936, the Court entered judgment in favor of the plaintiff, based upon the jury verdict, finding plaintiff entitled to the recovery of insurance benefits from and after January 1, 1919.

And thereafter on the 19th day of December, 1936, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including March 17, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including March 17, 1937.

DATED this 19th day of December 1936.

H. A. Hollzer
United States District Judge.

And thereafter on the 16th day of March 1937, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including June 16, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including June 16, 1937.

DATED this 16th day of March, 1937.

H. A. Hollzer

United States District Judge.

And thereafter on the 11th day of June, 1937, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor.

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including July 16, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including July 16, 1937.

DATED this 11th day of June, 1937.

H. A. Hollzer
United States District Judge.

And thereafter on the 13th day of July, 1937, upon application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Peirson M. Hall, United States Attorney, for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including August 16, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including August 16, 1937.

DATED this 13th day of July, 1937.

Wm. P. James
United States District Judge.

And thereafter on the 5th day of August 1937, it was stipulated by Counsel for the respective parties, with the approval of the Court, that the time in which the defendant might serve and file its proposed Bill of Exceptions be extended to and including September 16, 1937.

And thereafter on the 5th day of August 1937, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including September 16, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including September 16, 1937.

DATED this 5th day of August, 1937.

H. A. HOLLZER
United States District Judge.

And thereafter on the 7th day of September, 1937, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed.

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Ben Harrison, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve, file, and settle its Bill of Exceptions herein is hereby extended to and including November 16, 1937.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including November 16, 1937.

DATED this 7th day of September, 1937.

H. A. HOLLZER
United States District Judge.

And thereafter on the 12th day of November, 1937, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed:

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Ben Harrison, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve, file and settle its Bill of Exceptions herein is hereby extended to and including January 15, 1938.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including January 15, 1938.

DATED this 12th day of November, 1937.

H. A. HOLLZER
United States District Judge.

And thereafter on the 10 day of January, 1938, upon the application of the defendant and good cause shown, the following order was signed by the Court and filed:

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM"

On motion of Ben Harrison, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve, file, and settle its Bill of Exceptions herein is hereby extended to and including March 16, 1938.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including March 16, 1938.

DATED this 10 day of January, 1938.

H. A. HOLLZER
United States District Judge.

And thereafter on the 26 day of February, 1938, upon the application of the defendant and for good cause shown, the following order was signed by the Court and filed:

(Title of Court and Cause)

"ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILL BILL OF EXCEPTIONS and EXTENDING TERM."

On motion of Ben Harrison, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and good cause appearing therefor,

IT IS ORDERED that the time within which the defendant herein may serve, file and settle its Bill of Exceptions herein is hereby extended to and including April 16, 1938.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including April 16, 1938.

DATED this 26 day of February, 1938.

H. A. HOLLZER
United States District Judge.

And now in furtherance of justice and that right may be done, the defendant, the United States of America, presents the foregoing as and for its Bill of Exceptions in the above-entitled cause and prays that the same may be settled, allowed, signed and filed as such.

Ben Harrison
Ben Harrison
United States Attorney

Ernest D. Fooks
Ernest D. Fooks, Attorney,
Department of Justice

Attorneys for Defendant.

The foregoing Bill of Exceptions contains all of the evidence, both oral and documentary, and of the proceedings relating to the trial and judgment in this action.

DATED at Los Angeles, California, this 19th day of Feby, 1938.

Ben Harrison
Ben Harrison
United States Attorney

Ernest D. Fooks
Ernest D. Fooks, Attorney,
Department of Justice

Attorneys for Defendant.

Service of the above and foregoing draft of the Bill of Exceptions in this action is herewith acknowledged this 19th day of February, 1938.

Alvin Gerlack
Alvin Gerlack

Attorney for Plaintiff.

(Title of Court and Cause)

"STIPULATION"

It is hereby stipulated by and between the attorneys for the respective parties hereto, that the foregoing draft of the Bill of Exceptions contains all the evidence given and proceedings had on the trial of this action, and that it is correct in all respects and may be approved, allowed, settled and ordered filed as the Bill of Exceptions in this action and made a part of the record herein upon the filing of this stipulation, without further or other notice to plaintiff or her counsel.

DATED Febr. 19th, 1938.

Ben Harrison
Ben Harrison
United States Attorney

Ernest D. Fooks
Ernest D. Fooks, Attorney,
Department of Justice

Attorneys for Defendant.

Alvin Gerlack
Alvin Gerlack

Attorney for Plaintiff.

The foregoing Bill of Exceptions, having been presented within the time allowed by law and this Court, and having been seen and examined by the Honorable Harry A. Hollzer, United States District Judge, who presided at the trial, contains all the evidence offered and introduced on the trial of this cause of Frances Hill, plaintiff, vs. United States of America, Defendant, and correctly shows the proceedings had on said trial; and the said Bill of Exceptions is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, this 26 day of February, 1938.

H. A. Hollzer
HARRY A. HOLLZER
United States District Judge Southern District of California Central Division.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

FRANCIS HILL, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant	No. 6155-H AFFIDAVIT OF SERVICE BY MAIL.

UNITED STATES OF AMERICA)
) ss.
Southern District of California)

Bertha W. Ink, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business ad-

dress is 360 Pacific Electric Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on November 24, 1937, she deposited in the United States Mails in the Post Office Los Angeles, California in the above-entitled action, in an envelope bearing the requisite postage, a copy of Defendants Proposed Bill of Exceptions in the above-entitled cause, the original of which has this date been lodged with the Clerk of the United States District Court, Southern District of California, addressed to

Alvin Gerlack, Esq.,
Attorney at Law,
845 Mills Building,
San Francisco, California.

at which place there is a delivery service by United States Mail from said post office.

Bertha W. Ink
BERTHA W. INK

SUBSCRIBED and SWORN to before me, this 24 day of November, 1937.

R. S. ZIMMERMAN, Clerk, U. S. District Court,
Southern District of California

[Seal] By L. B. Figg Deputy.

[Endorsed]: Lodged Nov 24, 1937 R. S. Zimmerman Clerk By Edmund L. Smith, Deputy Clerk. Filed Feb 26, 1938 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

FRANCES HILL,	)	
	:	
Plaintiff,	)	
	:	No. 6155-H
vs.	)	PETITION
	:	FOR APPEAL
UNITED STATES OF AMERICA,	)	
	:	
Defendant.	)	

TO: THE HONORABLE HARRY A. HOLLZER, JUDGE OF THE ABOVE-ENTITLED COURT:

NOW COMES the defendant, United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and feeling itself aggrieved by the judgment entered in this cause, hereby prays that an appeal may be allowed, to-wit: from the United States District Court for the Southern District of Cali-

fornia to the United States Circuit Court of Appeals for the Ninth Circuit, and in this connection this Petitioner, with this Petition, hereby presents its Assignments of Error.

DATED this 16th day of March, 1937.

Peirson M. Hall
PEIRSON M. HALL
United States Attorney.

Ernest D. Fooks
ERNEST D. FOOKS, Attorney,
Department of Justice.

Attorneys for Defendant.

Presented by:

Ernest D. Fooks
ERNEST D. FOOKS, Attorney,
Department of Justice.

[Endorsed]: Filed Mar 16 1937 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

COMES NOW the defendant, the United States of America, by Peirson M. Hall, United States Attorney for the Southern District of California, and Ernest D. Fooks, Attorney, Department of Justice, and for its Assignments of Error alleges as follows:

I.

That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence, on the ground that plaintiff failed to prove by substantial evidence that she became permanently and totally disabled on or prior to midnight of August 31, 1919, during the life of her contract of insurance.

II.

That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence and submitting the facts to the jury for its determination, in that plaintiff failed to sustain the burden of proof by a fair preponderance of the evidence.

III.

That the Court erred in overruling defendant's objection to a question propounded to a physician, on the ground that the question called for an answer which would invade the province of the jury, and permitting the physician to testify as follows:

Question: "From your finding as to the condition of her heart would you say that it was of a permanent or temporary character?"

Answer: "Permanent."

IV.

That the Court erred in denying defendant's motion to strike the answer of the physician who testified that plain-

tiff was suffering from a condition of the heart permanent in character, in February, 1919, and in not instructing the jury to disregard the physician's answer, in that the answer invaded the province of the jury.

V.

That the Court erred in permitting a physician to testify that in November, 1920, plaintiff was suffering from a permanent heart condition, and in not striking the physician's answer and instructing the jury to disregard the same. The question propounded to the physician and his answer thereto were as follows:

Question: "You stated her heart condition was permanent?"

Answer: "Yes."

VI.

That the Court erred in entering judgment for the plaintiff and against the defendant based on the verdict of the jury that plaintiff became permanently and totally disabled from following continuously any substantially gainful occupation from January 1, 1919, in that the verdict of the jury did not conform to the allegations of the complaint and the verdict of the jury was contrary to the evidence and the law.

DATED this 16th day of March, 1937.

Peirson M. Hall
PEIRSON M. HALL,
United States Attorney.
Ernest D. Fooks
ERNEST D. FOOKS, Attorney,
Department of Justice.
Attorneys for Defendant.

[Endorsed]: Filed Mar 16 1937 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

IT IS HEREBY ORDERED that the appeal prayed for in the Petition for Appeal in the above-entitled cause be allowed.

DATED this 16th day of March, 1937.

H. A. Hollzer
United States District Judge.

[Endorsed]: Filed Mar 16 1937 R. S. Zimmerman, Clerk By L. B. Figg Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

You will please prepare a Transcript on Appeal herein including the following portions of the record, to-wit:

1. Citation filed March 16, 1937.
2. Complaint—War Risk Insurance, filed December 28, 1932.
3. Affidavit of service by mail filed March 21, 1933.
4. Answer filed June 14, 1933.
5. Minute Order made and entered on September 24, 1935, amending Answer.
6. Minute Order made and entered on December 8, 1936, dismissing the second cause of action.
7. Minute Order made and entered on December 11, 1936.
8. Verdict dated December 11, 1936.
9. Minute Order made and entered on December 15, 1936.
10. Judgment on Verdict, entered December 18, 1936.
11. Bill of Exceptions.
12. Petition for Appeal.

13. Order Allowing Appeal.

14. Assignments of Error.

15. This Praecipe.

16. Eliminate all titles of court and cause except on complaint, judgment and petition for appeal, and and eliminate all endorsements except filing dates.

BEN HARRISON
BEN HARRISON
United States Attorney

ERNEST D. FOOKS
ERNEST D. FOOKS, Attorney,
Department of Justice.

Attorneys for Defendant and Appellant.

Receipt of copy is acknowledged of the foregoing Praecipe, and it is stipulated that the contents thereof may constitute the record on Appeal.

DATED this 26th day of February, 1938.

Alvin Gerlack
ALVIN GERLACK
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 28, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 342 pages, numbered from 1 to 342 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; affidavit of service; answer; order of September 24, 1935; order of December 8, 1936; order of December 11, 1936; order of December 15, 1936; judgment; bill of exceptions; petition for appeal; assignments of error; order allowing appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of April, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. ---8815

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCES HILL, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

BENJAMIN HARRISON,
United States Attorney.

ERNEST D. FOOKS,
Attorney, Department of Justice.

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
Special Assistant to the Attorney General.

KEITH L. SEEGMILLER,
Attorney, Department of Justice.

INDEX

CITATIONS

72022—38——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCES HILL, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLANT

STATEMENT OF FACTS

This suit was brought on a contract of war risk term insurance issued to plaintiff during her military service from March 28, 1918, to February 3, 1919. The policy, in force to August 1, 1919, was alleged to have matured by total permanent disability on the date of the plaintiff's discharge from service.

The only issue presented in the trial court was raised by defendant's denial that the plaintiff became totally permanently disabled during the life of the contract. After all the evidence had been

introduced, defendant's motion for a directed verdict on the ground that there was no substantial evidence to support a verdict for the plaintiff was denied, and an exception reserved. Thereafter, the jury returned a verdict for the plaintiff, finding that she became totally permanently disabled on January 1, 1919 (R. 322), and, in accordance therewith, judgment in her favor was entered on December 18, 1936 (R. 22–24).

Defendant's petition for appeal (R. 336) and assignments of error (R. 338–339) were filed, and appeal allowed (R. 340) on March 16, 1937. The bill of exceptions was settled on February 26, 1938, within the judgment term as extended for that purpose by special orders of court (R. 323–324).

QUESTION PRESENTED

Whether there was substantial evidence that the plaintiff became totally permanently disabled during the life of the war risk term insurance contract.

ASSIGNMENTS OF ERROR (R. 338–339)

The foregoing question is raised by assignments of error Nos. I and II, as follows:

I

> That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence, on the ground that plaintiff failed to prove by substantial evidence that she became permanently and

totally disabled on or prior to midnight of August 31, 1919, during the life of her contract of insurance.

II

That the Court erred in denying defendant's motion for directed verdict at the conclusion of all of the evidence and submitting the facts to the jury for its determination, in that plaintiff failed to sustain the burden of proof by a fair preponderance of the evidence.

SUMMARY OF THE EVIDENCE

The plaintiff, a trained nurse twenty-four years of age, entered the military service May 28, 1918 (R. 26). She was assigned to a hospital in Liverpool, England. In October and November 1918, she was ill with influenza (R. 62), and either acute bronchitis (R. 62) or bronchial pneumonia (R. 28, 66). She was treated from October 2 to 10 and November 1 to 12, 1918 (R. 62), and then resumed duty for a short period. She returned to the United States in December 1918, and was given an eighteen-day furlough prior to her discharge on February 3, 1919. She testified that she felt "pretty good" when she first resumed duty, but was ill on the voyage to the United States and during the leave of absence granted prior to her final separation from service (R. 30, 31).

Upon examination prior to separation from service the plaintiff complained of pain in her left lung

(R. 63), although no disability was disclosed by examination at that time (R. 64).

The medical evidence of the condition of the plaintiff's health subsequent to her discharge from service consisted of the reports of twenty-six physical examinations dated periodically from December 1919 until November 1931 (R. 289–311), and the testimony of several physicians.

The examination reports show diagnoses of pulmonary tuberculosis, arrested. Activity was suspected by one examiner on August 16, 1920 (R. 291–292). However, two months of hospital observation immediately following resulted in the following certification by the examining physician on October 21, 1920:

> This is to certify that Miss Frances Hill, now a patient in this Hospital, is an arrested case of Pulmonary Tuberculosis, and physically able to accept vocational training (R. 293).

Except for the single possible exception indicated above, the numerous medical reports disclose that the plaintiff's tuberculosis was arrested at the time of the examinations to which the reports related. On November 31, 1923, a Board of Three Doctors examined the plaintiff and reported that "If this patient ever had pulmonary tuberculosis it has left no positive signs" (R. 302).

Dr. Wheeler testified that when he examined the plaintiff in the spring of 1923, he thought her tuberculosis was active (R. 122), and Dr. Cohn diag-

nosed the case as active tuberculosis in 1929 and 1935, but testified that the condition was quiescent when he examined her in 1936 (R. 133).

None of the eighteen medical examinations of the plaintiff (reports of which were contemporaneously made and preserved) from December 1919 to February 1924 (R. 289–302) revealed any heart disability. As least seven of these reports specifically recited findings that the heart was normal. An examination made on August 17, 1926 revealed a condition characterized by the examining doctor as "Probably a 'nervous heart'" (R. 304). On April 25, 1927, Dr. Palmer found the plaintiff's heart to be normal and operated upon her for removal of her gall bladder and appendix, administering a general anesthetic (ether) (R. 274–275). The plaintiff recovered from the operation in a very satisfactory manner, and was released from the hospital at the expiration of six days (R. 275). Reports of examinations made in 1931 described plaintiff's heart condition as tachycardia, simple, and chronic aoritis, well compensated (R. 308–309, 311).

Dr. Wolfsohn, who treated the plaintiff during her military service, examined her again in 1935, at which time, he testified, he found a pulmonary condition, heart murmurs, and dilation. From history received from the plaintiff, he testified to an opinion that the pulmonary condition resulted from her illness in 1918, but declined to express an

opinion either as to the degree of disability resulting from the heart trouble, or the probable date of its inception (R. 68, 69).

Dr. Duncan examined the plaintiff in September 1923, prior to her entrance upon duty in the United States Civil Service, for the purpose of ascertaining whether she had any disability at that time. He considered her to be free from disability. Although he was given a history of active tuberculosis, he deemed that condition to be arrested, and despite the fact that he was called as a witness for the plaintiff, neither his testimony nor the report of his examination make any reference to a heart disability (R. 128).

Dr. Sharp testified that when he examined the plaintiff in El Paso, Texas, in February 1919[1] (1920), "She had, as I recall it, myocarditis and a heart condition aortitis, an inflamatory condition of the aorta" (R. 106). This, in substance, was the same finding made upon his examination of the plaintiff in 1935 (R. 107). As to the examination made in 1920, he further testified:

> * * * well, as I stated before (this is all from memory of the case) I recall she had a general breakdown at that time as a result of her condition and this other situation (strenuous work nursing a serious case of pneumonia) that I speak of, I wouldn't at-

[1] Since plaintiff was not in El Paso until February 1920 (R. 33–34), this date is clearly erroneous.

> tempt to enumerate the symptoms at the time because I have no record of the case available. [Second parenthetical insert supplied.] (R. 107.)

Interrogated as to whether he deemed the condition which he found in 1920 to be of a temporary character, this witness answered: "I don't think so. The reason is, I examined Miss Hill again last year" (R. 108).

Dr. Long testified that he examined the plaintiff in November 1920, and that "I recall that she had very mild tuberculosis and heart lesion. * * * it would probably make her heart condition worse to engage in a strenuous exercise" (R. 102).

Dr. McGill testified that upon examination of the plaintiff in February 1919, during the year 1921, and on January 6, 1936, he found rales in the upper lobes of both lungs, sputum positive for tuberculosis, large heart, mitral regurgitation (R. 84), evening temperature, rapid pulse, low blood pressure, and cough (R. 85). He deemed the condition to be substantially the same each time he examined her. He testified that her heart condition has always been "so pronounced that even a novice could hear it" (R. 90); "That condition of her heart was so serious that we never expected the patient to get well" (R. 99); and that "the heart diseases were absolutely incurable and on account of these diseases it was very doubtful if the tuberculosis would ever be arrested. I don't think she could ever become cured of her tubercular con-

dition—I didn't think it then and I don't think it now" (R. 92).

This witness further testified that while a person with a slight leak of the heart may, by reason of compensation, lead a fairly active life, such compensation is not possible "with a person with as bad and as big a leak as this person had" (R. 95), and that if she attempted to work as a nurse, it would perhaps be fatal to her, or result in serious impairment of her health—"her condition was explained to her so she would understand why it was necessary to take a rest for months and months, years and years, if necessary" (R. 91).

Drs. Cohn, Welfield and Young, who examined the plaintiff in 1929, 1935, 1936, and 1937, testified, in substance, that they found her to be afflicted with a serious heart condition (R. 133, 181, 186). Dr. Cohn deemed this condition to be worse in 1935 than in 1929 (R. 133). Upon the basis of hypothetical questions assuming as true all of the evidence in the case excepting only the diagnoses of other doctors, each of these witnesses testified to opinions, in effect, that the plaintiff was suffering from a serious and incurable heart condition in February 1919, which would have been aggravated by work (R. 141, 183, 191–192). Drs. Young and Welfield expressly admitted that, in arriving at their opinions, they did not accept the findings shown in numerous medical reports introduced in evidence (R. 184, 202, 203–205). The testimony of Dr. Cohn was clearly to the same effect (R. 147).

There was testimony that plaintiff was ill en route from New York to Arkansas in January 1919 (R. 73), and that soon thereafter she consulted Drs. Kirby and McGill, personal friends with whom she had worked prior to service, who, she testified, treated her for her chest condition and upset stomach (R. 31). It was also in evidence that Dr. Kirby (who, plaintiff testified, died in 1922, R. 32) removed plaintiff's tonsils in May 1919 (R. 38). As heretofore pointed out, these doctors advised plaintiff to rest, but some two or three months after her return home, she engaged in her prewar occupation of nursing, and continued in such work being actually on duty one-third to one-half time until November 1919 (R. 32), when she went to Tucson, Arizona. Thereafter, until February 1920, her name was on call on the Nurses' Registry. She testified she did not respond to all calls because she "couldn't stand the work at all", and was actually on duty, she estimated, an aggregate of about two weeks between November 1919 and February 1924 (R. 34).

From Tucson she went to El Paso, Texas, in the latter part of February 1920, and with the exception of a few short absences, lived at El Paso until April 1922. During that period, she was in vocational training in X–ray work for six or seven months. She testified that portions of this work were too heavy for her, and that she did not "get along so well" (R. 34). Dr. Mason, with whom she took vocational training, testified that she was

not interested in X–ray work and since she did not care to learn it, her services were called for only when necessary (R. 249); that she was present practically all the time from 8:30 A. M. to 5:00 P. M. each day, and that "I do not recall any shortness of breath on her part" (R. 249); and that "she didn't give me the appearance of anyone that was suffering from an active tuberculosis or running a fever, or anything of the sort" (R. 250).

During vocational training, the plaintiff received maintenance allowance in the amount of $100.00 per month (R. 59).

Subsequent to her vocational training, the plaintiff took private cases as a nurse and, pursuant to call from the Nurses' Registry, upon which her name was kept, worked about two months in Globe, Arizona, during the latter part of 1922. This work was followed by a short period of rest, after which she took a position for one month in the Inspiration Hospital, quitting, she testified, because she couldn't stand the work (R. 38). For two months prior to November 1922 she worked in a hospital in Kingman, Arizona, again leaving, she testified, because she couldn't stand the work (R. 38). She then went to Phoenix, where, by reason of a severe cold, she refrained from work during the balance of the year 1922.

From January to July 1923 the plaintiff worked under the supervision of Dr. Wheeler in an Indian Sanitarium. She testified that her work was ir-

regular; that sometimes she was too weak and tired to get out of bed in the morning, but that she worked every day she could. She quit that work on Dr. Wheeler's advice that she take an extended rest (R. 39).

From October 1923 to April 1924, she was employed in the Smelter Hospital at Hayden, Arizona. She testified that although this was light work, she couldn't stand it any longer and quit (R. 40).

During the summer of 1924, she returned to Arkansas for a visit with her family, and passed a United States Civil Service examination, including a physical examination heretofore mentioned (R. 127–128), for a position in the Indian School Hospital. Pursuant thereto, she was employed in that position from September 1924 to February 1925. She quit, according to her testimony, because she couldn't stand the work (R. 41).

She testified that thereafter, until 1929, she took a few private cases, none of which lasted for more than one week; that she was ill and confined to her bed about four months during the winter and spring of 1928, and for a time during the winter of 1929. She estimated that her work from 1925 to 1929 aggregated four or five weeks each year (R. 43).

Bertha Case, who managed the Nurses' Registry upon which the plaintiff's name was kept from 1922 to 1929 (R. 113), testified that the plaintiff actually worked on calls from the Registry about

half-time, on an average, throughout these years (R. 114).

Florence Scales, under whose supervision the plaintiff worked upon occasions from 1923 to 1930 (R. 115), testified that she averaged about six months during each of these years (R. 118). Records of the Nurses' Registry show that, from November 10, 1929, to August 31, 1930, the plaintiff responded to thirteen different calls for duty (R. 265). The last assignment was to the Magna Copper Company Hospital (R. 265), where the plaintiff worked from September 1, 1930, to February 3, 1931 (R. 44).

Dr. Swackhamer, who worked at the hospital with the plaintiff during that time, testified that she was on duty continuously except for a 15-day absence to attend her brother's funeral in Arkansas, and that "Plaintiff received $100.00 per month with board and room, while employed by me; that her work was satisfactory and that she was receiving pay for the work she performed and for no other reason" (R. 285). During this period of work, Dr. Swackhamer examined the plaintiff and found an enlargement of the aorta in the left upper chest, prognosis fair, "nothing serious, provided she did not attempt to do too much work." The reason for his examination, he testified, was that the "plaintiff was complaining a little" (R. 284).

Since her discharge from service, the plaintiff has received hospital treatment for about three months in 1920 (R. 46), and for about eight months in 1931 (R. 45). In addition to $100.00 per month which she received during her vocational training, the plaintiff has received from sources other than earnings or gifts (presumably compensation, although the record does not so state), $1,371.46 between February 14, 1919, and June 30, 1923; $148.39 on October 22, 1926; and $50.00 per month since October 1926 (R. 321). She made her first claim of total permanent disability at discharge on June 18, 1931, and testified "that is the first time I knew I had a right to assert a claim" (R. 47).

ARGUMENT

We submit that there is no substantial evidence on the basis of which reasonable men, uninfluenced by prejudice, speculation, or sympathy, could find that the plaintiff herein was totally and permanently disabled in 1919, within the meaning of that term as defined in numerous decisions of the Supreme Court and the United States Circuits Courts of Appeals. The Circuit Court of Appeals for the First Circuit has said, concerning the phrase "total permanent disability":

> They are powerful words carrying a high content of meaning which perhaps has not always been fully recognized in cases of this character (*United States* v. *Alvord,* 66 F.

(2d) 455, 457 (C. C. A. 1st), certiorari denied, 291 U. S. 661).

The plaintiff is an intelligent, professionally trained person who has claimed and received the gratuitous benefits provided for veterans having a partial disability (R. 59, 267, 321), and who qualified for a Civil Service position (R. 40–41). Moreover, she is shown to have been in receipt of other income, obviously including compensation for arrested tuberculosis,[2] making it financially unnecessary for her to engage in strenuous activities in earning a livelihood.

Despite the familiarity she has shown with the gratuities provided by the Federal Government, and the opportunities for full insurance information afforded by her activities and associations since her service, she offers no other explanation for the long delay in the assertion of her present claim (first made in 1931) than lack of knowledge (R. 47). Cf. *Miller* v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734, in which the Supreme Court, citing *Lumbra* v. *United States,* 290 U. S. 551, stated:

> His long delay before bringing suit is wholly incompatible with a belief on his part that he was totally and permanently disabled during the period while his policy was in force. *Id.,* p. 560; *United States* v. *Hairston,* 55 F. (2d) 825, 827. If petitioner thought him-

[2] Section 202, Subsection 7, World War Veterans' Act (38 U. S. C. 480).

> self totally and permanently disabled, it is difficult to understand why he waited twelve years before attempting to assert his rights. The only explanation he makes for his delay is that he thought a man had to die to get the insurance. How he discovered his error after the extraordinary lapse of time indicated above we are not told. He was intelligent, had completed the third grade at high school, and a year at military school. It does not seem possible that he had never read the policy, which so plainly insures against total permanent disability. In the light of all the circumstances, his explanation is not credible (pp. 441–442).

And see *Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th).

For nearly twelve years subsequent to the date upon which she now claims to have become totally permanently disabled, the plaintiff was engaged in the active practice of her profession, representing by the maintenance of her name on the Nurses' Registry that her services were available to the public. Moreover, it was shown that she was called for and responded to duty with that degree of regularity reasonably to be expected in the course of such professional practice, as distinguished from salaried employment. It may be assumed that due regard for her health required periods of rest from the strenuous activities of nursing. Certainly this would be true of anyone in her profession. Moreover, if the periodic non-acceptance of calls, to

which she testified, be deemed other than the usual practice of private nurses, and is accepted as evidence even of total disability at such times, her case cannot thus be established, for the Supreme Court has stated:

> Periods of total temporary disability, though likely to recur at intervals, do not constitute the disability covered by the policy, for "permanent" means that which is continuing as contrasted with that which is "temporary" (p. 505) (*United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731).

Cf.:

> *United States* v. *Hansen,* 70 F. (2d) 230 (C. C. A. 9th), certiorari denied, 293 U. S. 604.
>
> *United States* v. *Timmons,* 68 F. (2d) 654 (C. C. A. 5th).
>
> *United States* v. *Hodges,* 74 F. (2d) 617 (C. C. A. 6th).

Whatever activity of tuberculosis the plaintiff may have had (and there is no showing that the involvement was ever extensive), there is an absence of any medical testimony of activity of the disease for many years during the period intervening between the date of claimed total permanent disability, and the date of trial, and her activities as a nurse, possessed of more than average medical knowledge, are wholly inconsistent with the belief on her part that she had a continuing active tuberculosis. The decisions denying recovery in war

risk insurance cases for incipient tuberculosis which has been, may be, or might have been arrested, are numerous. The following are typical:

Falbo v. *United States,* 64 F. (2d) 948 (C. C. A. 9th), affirmed per curiam, 291 U. S. 646.

United States v. *Walker,* 77 F. (2d) 415 (C. C. A. 5th), certiorari denied, 296 U. S. 612.

Grate v. *United States,* 72 F. (2d) 1 (C. C. A. 8th), certiorari denied, 294 U. S. 706.

United States v. *McShane,* 70 F. (2d) 991 (C. C. A. 10th), certiorari denied, 293 U. S. 610.

United States v. *McRae,* 77 F. (2d) 88 (C. C. A. 4th), certiorari denied, 295 U. S. 759.

United States v. *Reeves,* 75 F. (2d) 368 (C. C. A. 6th).

Robinson v. *United States,* 87 F. (2d) 343 (C. C. A. 2nd).

United States v. *Hammond,* 87 F. (2d) 226 (C. C. A. 5th).

United States v. *Rentfrow,* 60 F. (2d) 488 (C. C. A. 10th).

Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

The record of the plaintiff's disability during the years since 1919 established conclusively, we submit, that her heart condition—of whatever nature it may have been during the life of her insurance contract—did not then constitute a total permanent disability. Not only was her heart found to be normal upon repeated physical examinations by Government doctors, but an examina-

tion by a surgeon selected by her to perform a major operation in 1927 revealed a normal heart, upon the basis of both history and physical findings. In accordance with the usual precautionary routine of competent physicians. Dr. Palmer made a thorough examination, including an X-ray of the chest, because "her case history showed that she stated she had had a cough at one time" (R. 274, 275). His findings were concurred in by Dr. Brockway,[3] who had then treated her for six weeks, and who assisted with the operation (R. 275, 316). Moreover, these findings by her physicians were confirmed, we submit, by the absence of complications despite the use of a general anesthetic, and the rapid and complete recovery of the plaintiff (R. 275).

Furthermore, it is incredible that the plaintiff, with the knowledge of her own condition necessarily incident to her profession, would have submitted to a major operation without disclosing the fact of an existing heart condition, or of active or recently arrested tuberculosis, and while her testimony shows that she has been aware of her lung condition since 1919, it makes no reference to a heart disability. Indeed, she testified that Drs. McGill and Kirby treated her only for her lung disability and upset stomach (R. 31).

---

[3] Dr. Brockway was not called to testify, although he was living in Phoenix at the time of the trial (R. 58). Cf. *United States* v. *Blackburn*, 33 F. (2d) 564 (C. C. A. 9th).

The testimony of Dr. McGill and Dr. Sharp, although based upon memory after the lapse of many years (Cf. *Cunningham* v. *United States,* 67 F. (2d) 714 (C. C. A. 5th)), may be deemed to warrant a finding that the plaintiff had a heart disability in 1919, but their opinion testimony that it was then permanent, was conclusively shown to be erroneous, and should therefore be disregarded. Cf. *United States* v. *Spaulding,* 293 U. S. 498, rehearing denied, 294 U. S. 731. And see, *United States* v. *Mintz,* 73 F. (2d) 457 (C. C. A. 5th). See also, *United States* v. *Doublehead,* 70 F. (2d) 91, 92 (C. C. A. 10th), in which the court stated that:

> Liability upon an insurance contract cannot be created by a doctor's opinion.

The opinion testimony of Drs. Cohn, Welfield, and Young that plaintiff had a serious heart disability in 1919, was a clear invasion of the province of the jury, since each of these witnesses freely admitted that he had weighed the evidence and rejected certain portions thereof. Cf. *United States* v. *Stephens,* 73 F. (2d) 695 (C. C. A. 9th). Although admitted without objection, opinion testimony of this character has no probative value (Cf. *Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th)), and its admission in evidence constitutes reversible error *per se.* *United States* v. *White,* 77 F. (2d) 757 (C. C. A. 9th).

CONCLUSION

It is respectfully submitted that the trial court erred, and that the judgment should be reversed.

BENJAMIN HARRISON,
United States Attorney.
ERNEST D. FOOKS,
Attorney, Department of Justice.
JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Special Assistant to the Attorney General.
KEITH L. SEEGMILLER,
Attorney, Department of Justice.

JUNE 1938.

U. S. GOVERNMENT PRINTING OFFICE. 1938

No. 8815

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
FRANCES HILL,	*Appellee.*

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF

ALVIN GERLACK,
845 Mills Building,
San Francisco, Cal.,
Attorney for Appellee.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

STATUTES

MISCELLANEOUS

No. 8815

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,	*Appellant,*
vs.	
FRANCES HILL,	*Appellee.*

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

APPELLEE'S REPLY BRIEF

STATEMENT OF FACTS.

This is another "fact" case arising out of a suit at law upon a $10,000.00 policy of war risk insurance which the insured appellee carried during her service in the Army Nurses Corps during the World War, and upon which policy the premiums were paid until August 31, 1919—about six months after her discharge from the Army.

Appellee served overseas in various Army Hospitals in England where she first incurred the heart trouble and lung

trouble which formed the basis of her suit. The jury by their verdict found as a fact that these diseases rendered her totally and permanently disabled from January 1, 1919.

The assignments of error raise the sole question: Whether there is any substantial evidence to support the jury's verdict and the trial court's action in overruling the defendant's motion for a directed verdict.

The case, which took a full week to try, resulted in a verdict for plaintiff upon somewhat conflicting evidence, the shorthand reporter's transcript containing over 600 pages of testimony and proceedings.

It impresses us that counsel for the appellant are "conveniently brief" in their recitation of the facts in their brief, and as a determination of this appeal on its merits depends upon an examination of the Record to determine if there is *any* substantial evidence to support the verdict, it will therefore be necessary to quote from the Record itself in order to determine if it contains evidence sufficient to justify the verdict.

Counsel for the appellant made and presented a motion for a directed verdict and the trial court, in the exercise of a sound judicial discretion, having considered such motion and the evidence as introduced at the trial and having denied the motion, is a determination by the trial court, as well as by the jury, that the verdict was just and amply supported by the evidence.

ASSIGNMENTS OF ERROR.

Appellant specifies six assignments of error (R. 338). However, in their brief (page 2) counsel apparently abandon all but the first two assignments, thereby leaving the sole question whether there is any substantial evidence in the record to sustain the jury' verdict.

However, appellant's assignments of error Nos. III, IV and V are without merit.

See

Corrigan v. United States, 82 Fed.(2d) 106 (C.C.A. 9);

United States v. Aspinwall (No. 8715, C.C.A. 9), Decided May 20, 1938.

Appellant's assignment No. VI is likewise without merit.

See

California Code of Civil Procedure, Section 580;
United States v. Rye, 70 Fed.(2d) 150 (C.C.A. 10);
Fleischman v. Lotito, 6 Cal.(2d) 365;
Manke v. United States (C.C.A. 9) 38 Fed.(2d) 624.

PERTINENT STATUTES AND REGULATIONS INVOLVED.

Pertinent statutes and regulations bearing on the particular point involved in this appeal are as follows:

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> "That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse

Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided.''

This section was restated in substance in subsequent amendments (Sec. 300 World War Veterans Act, 1924; U. S. C., Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, ''permanent and total disability'' was defined as follows:

''Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

''Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *''

In addition Section 19 of the World War Veterans Act as amended (38 U. S. Code, 445), provides that in the event of disagreement between the insured veteran and the government suit may be brought in the district court etc.

QUESTION PRESENTED.
(With Citations Only)

Is there any substantial evidence to sustain the jury's verdict?

Parsons v. Bedford, 3 Peters 433, 7 L. Ed. 732;

Corsicana National Bank v. Johnson, 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721;

Lumbra v. United States, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492;

United States v. Aspinwall (No. 8715, C.C.A. 9), decided May 20, 1938;

United States v. Thompson (C.C.A. 9), 92 Fed.(2d) 135;

United States v. Klener (C.C.A. 9), 93 Fed.(2d) 15, 16;

La Marche v. United States (C.C.A. 9), 28 Fed.(2d) 828;

Marsh v. U. S., 33 Fed.(2d) 554;

United States v. Barker, 36 Fed.(2d) 556;

Hayden v. United States (C.C.A. 9), 41 Fed.(2d) 614;

Mulivrana v. United States (C.C.A. 9), 41 Fed.(2d) 734;

United States v. Burke (C.C.A. 9), 50 Fed.(2d) 653;

United States v. Meserve (C.C.A. 9), 44 Fed.(2d) 549;

United States v. Rasar (C.C.A. 9), 45 Fed.(2d) 545;

United States v. Rice (C.C.A. 9), 47 Fed.(2d) 749;

United States v. Stamey (C.C.A. 9), 48 Fed.(2d) 150;

United States v. Lawson (C.C.A. 9), 50 Fed.(2d) 646;

Sorvik v. United States (C.C.A. 9), 52 Fed.(2d) 406;

United States v. Lesher (C.C.A. 9), 59 Fed.(2d) 53;

United States v. Dudley (C.C.A. 9), 64 Fed.(2d) 743;

United States v. Francis (C.C.A. 9), 64 Fed.(2d) 865;

United States v. Burleyson (C.C.A. 9), 44 Fed.(2d) 868;

United States v. Todd (C.C.A. 9), 70 Fed.(2d) 540;

United States v. Suomy (C.C.A. 9), 70 Fed.(2d) 542;

United States v. Kane (C.C.A. 9), 70 Fed.(2d) 396;

Vance v. United States (C.C.A. 7), 43 Fed.(2d) 975;

Malavski v. United States (C.C.A. 7), 43 Fed.(2d) 974;

Ford v. United States (C.C.A. 1), 44 Fed.(2d) 754;

United States v. Phillips (C.C.A. 8), 44 Fed.(2d) 689;

Barksdale v. United States (C.C.A. 10), 46 Fed.(2d) 762;

United States v. Godfrey (C.C.A. 1), 47 Fed.(2d) 126;

Carter v. United States (C.C.A. 4), 49 Fed.(2d) 221;

Kelley v. United States (C.C.A. 1), 49 Fed.(2d) 897;

United States v. Tyrakowski (C.C.A. 7), 40 Fed. (2d) 766;

United States v. Storey (C.C.A. 10), 60 Fed.(2d) 484;

United States v. Albano (C.C.A. 9), 63 Fed.(2d) 677;

United States v. Sorrow (C.C.A. 5), 67 Fed.(2d) 372;
United States v. Adams (C.C.A. 10), 70 Fed.(2d) 486;
United States v. Anderson, 70 Fed.(2d) 537;
United States v. Flippence (C.C.A. 10), 72 Fed. (2d) 611;
United States v. Brown (C.C.A. 10), 72 Fed.(2d) 608;
United States v. Higbee, 72 Fed.(2d) 773;
United States v. Harless (C.C.A. 4), 76 Fed.(2d) 317;
Gray v. United States (C.C.A. 8), 76 Fed.(2d) 233;
Vietti v. Hines, 48 Cal. App. 266, 192 Pac. 80.

We submit the jury's verdict is amply supported by substantial evidence as shown by the record.

THE RULE.

Regarding jury trials, almost one hundred years ago Justice Storey of the United States Supreme Court, in *Parsons v. Bedford,* 3 Peters 433, 7 L. Ed. 732, said:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union * * *. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was

adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

Probably the leading case in the Federal courts on the quantum of evidence necessary to sustain a jury's verdict is *Gunning v. Cooley,* 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 721, in which the Court, per Mr. Justice Butler, said (50 S. Ct. 233):

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. (Citing cases.) Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. (Citing cases.)"

And the rule regarding the quantum of evidence necessary to sustain a verdict in the Ninth Circuit has been very aptly stated by the late Judge Sawtelle, in our opinion one of the ablest judges ever to have sat on the Circuit Court of Appeals for the Ninth Circuit. In *United States v. Burke,* 40 Fed.(2d) 653, at page 656, Judge Sawtelle said:

"Courts often experience great difficulty in determining whether a given case should be left to the decision of the jury or whether a verdict should be directed by the court. Fortunately however, the rule in this circuit has been definitely settled and almost universally observed. Judge Gilbert, for many years and until recently, the distinguished senior judge of this court, whose gift for expression was unsurpassed has stated the rule as follows:

> 'Under the settled doctrine as applied by all the federal appellate courts, when the refusal to direct a verdict is brought under review on writ of error, the question thus presented is whether or not there was any evidence to sustain the verdict, and whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.'

> And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant, it is for the jury to determine what facts are established even if their verdict be against the decided preponderance of the evidence. (Citing cases.)"

And in *United States v. Dudley,* 64 Fed.(2d) 743, this Court said:

> "The question before us is whether or not this evidence is so substantial as to justify submission of the case to the jury. We do not weigh the evidence; what our verdict would have been as jurymen is immaterial."

See also the following decisions of this Court:

United States v. Lesher, 59 Fed.(2d) 53;
United States v. Barker, 36 Fed.(2d) 556;
United States v. Meserve, 44 Fed.(2d) 549;
United States v. Rice, 47 Fed.(2d) 749;
United States v. Stamey, 48 Fed.(2d) 150;
United States v. Lawson, 50 Fed.(2d) 646;
Corrigan v. United States, 82 Fed.(2d) 106;
Hayden v. United States (C.C.A. 9), 41 Fed.(2d) 614;
Mulivrana v. United States (C.C.A. 9), 41 Fed.(2d) 734;
United States v. Rasar (C.C.A. 9), 45 Fed.(2d) 545;
Sorvic v. United States, 52 Fed.(2d) 406.

See also:

Corsicana National Bank v. Johnson, 251 U. S. 68, 40 S. Ct. Rep. 82, 64 L. Ed. 141;
Vance v. United States (C.C.A. 7), 43 Fed.(2d) 975;
Malavski v. United States (C.C.A. 7), 43 Fed.(2d) 974;
United States v. Godfrey (C.C.A. 1), 47 Fed.(2d) 126;
Ford v. United States (C.C.A. 1), 44 Fed.(2d) 754;
Carter v. United States (C.C.A. 4), 49 Fed.(2d) 221;
Kelley v. United States (C.C.A. 1), 49 Fed.(2d) 897;
United States v. Tyrakowski (C.C.A. 7), 50 Fed. (2d) 766.

Bearing in mind the rule, we now turn to an examination of the record to see if there is any substantial evidence upon which the verdict can be sustained under this rule.

ARGUMENT.

THERE IS ABUNDANT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN THE JURY'S VERDICT.

Preliminary Statement.

The plaintiff and appellee cannot agree that the statement of facts set forth by counsel for the defendant and appellant in their brief is either fair or accurate. We feel that counsel for the appellant, in setting forth their version of the facts, have utterly disregarded the basic rule of appellate procedure that all conflicts in the evidence are to be resolved in favor of appellee and all reasonable inferences to be drawn therefrom must likewise be resolved in favor of the party in whose favor the jury so found. Applying this rule to the facts we believe the facts as found by the jury to be substantially as follows:

Appellee's condition before she went to war.

Plaintiff testified that before the war she was a trained nurse and the Government stipulated that Miss Hill was in good health at the time she entered the Army. (R. 26)

What happened to appellee overseas.

Appellee testified (R. 27-30):

> "While I was in the service as a nurse in Liverpool at this army hospital under Major Wolfsohn the most unusual thing that happened to me so far as my

health is concerned is that I was working hard. There were 26 of we nurses. We were supposed to have a 500 bed hospital but when the influenza epidemic came along we crowded in patients until we had a thousand patients in a 500 bed hospital and only 26 nurses to take care of that number. We didn't have any extra nurses to take care of this load. There was no place to get extra nurses from. This happened the latter part of September in 1918. We were supposed to be on duty under normal conditions—supposed to work eight hours a day. In October, 1918, at the time of the influenza epidemic after we had begun to receive the influenza patients, we had orders not to go off duty when night came. The beginning of my experience with the flu was on a Sunday morning, and we had orders not to go off duty that night, and I worked 36 hours without going to my room at all, and the food that I ate, I ate while standing up. I didn't sit down during that time. We received these extra patients from the convoy from the States—transport from the States. I was working hard. I had been taking care of tuberculosis and receiving influenza patients and of course we had to put the influenza patients wherever we could find room for them. At that time I was taking care of influenza, also some tubercular still. Concerning the effect this had on me personally—I was working hard. Of course, to begin with, I worked 36 hours without any time off, and then I would have four or five hours, and probably six hours' sleep, and worked the balance of the time. I didn't go to the dining room for my meals; I ate my meals on the ward whenever I had time to eat at my convenience, and of course, the patents were—quite a few of them were delirious and trying to climb out of bed and coughing, and especially one patient that I tried to

hold in bed—I did hold him in bed. He was dying, coughing, and expectorated all over me. He spattered all over my face and glasses and cap. The mask that I was supposed to wear over my nose and mouth had fallen down in my struggle to try to hold him in bed, and I didn't turn loose of the patient, though, so long as he lived. When he quit breathing I took a piece of gauze and Lysol solution and washed off my glasses and my face, washed the pus off my lips, but I had to wear my uniform until such time as I could go off duty and change it. I wore it on and worked with this pus spattered all over me, all over my uniform and cap. The next thing that happened to me that was unusual so far as my health was concerned—I was still working long hours—at least 18 hours a day when I came down with influenza and pneumonia; that was sometime during the first of October. I was treated in my quarters as there was no room in the hospitals for the sick nurses. I was treated in my quarters by Major Wolfsohn. He was present at the time. He treated me personally, he visited me every day. I did not have a nurse to attend me . . . there was no nurse. I took care of myself the best I could. There were 3 of we girls in a small room together—all nurses—all sick. I was the only one that had pneumonia. The others had influenza. We took our own temperatures. My temperature at that time ran about 103 and 104 for about a week or ten days. I was in bed one morning when the doctor called on me, and my temperature was normal and, of course, I had a very bad cough at that time, and I was weak. I took my pulse at that time. I had a rising temperature, my pulse was rapid. I felt weak and bad, but I felt better this Monday morning. One morning when Dr. Wolfsohn called on me, and he asked me if I felt like

dressing myself, and I told him I did. He told me to dress myself that afternoon and if I felt like it to walk out as far as the big gate, which was probably a hundred feet from the front door of the administration building. The nurses' quarters were in the administration building.

I dressed myself and, of course, I really didn't feel like walking out there, but then I was trying to make believe. I walked out to the big gate very slowly, and on my way back I collapsed on the doorsteps. My heart pounded like it would stop. In fact, I think it did stop just for a second. I just collapsed, I was so weak I couldn't get any further. I lay there for a few minutes, and there was a nurse came along and helped me back to my bed—a Miss Ready, one of our nurses there. Then I stayed in bed. I undressed myself and went back to bed, and stayed in bed until the next morning. I went on duty the next morning. I was still awfully weak, my heart pounding every time I would walk. I went on duty just the same, we needed the nurses so badly. The nurses were all working until late at night. After that I stayed on duty for ten days, or a week—I don't remember how long—it was only a short time; but after I had been on duty a day or two I found I was having a rising temperature. I found it was 101, and finally it was 103. This was while I was nursing on these wards. I just turned weak on the ward and I dropped a glass of thermometers and broke the whole business, so I was ordered back to bed then by Dr. Wolfsohn. This time they admitted me to the ward, like they did the other patients. At that time I was treated ten days or two weeks, I believe. Dr. Wolfsohn treated me. He continued to treat me for that time. He wasn't the ward's

doctor. There was another doctor, but Dr. Wolfsohn also visited me at least once a day. After that I felt better. My temperature went down to normal—that is, they found it normal at least. I felt pretty good, then I went back on duty again. I left Europe to come back to the States the latter part of December, 1918. At the time I left England I felt very badly. I coughed all the time; I never felt like getting out of my bed in the morning when I left Liverpool."

In corroboration of her testimony, her Commanding Officer at Red Cross Army Hospital No. 4, Major (Dr.) Julian M. Wolfsohn (now head of one of the departments at Stanford University Medical School in San Francisco, testified (R. 66-67):

"I met her in Liverpool, England. I was chief of the Medical Service and Commanding Officer of the Red Cross Hospital No. 4 at Liverpool, England, and she was one of my nurses. Of my own knowledge I remember that—in about October, 1918, she was taken sick and I took care of her at that time. She was sick about eleven days with the so-called influenza and had bronchial pneumonia at that time. She was in her quarters for about eleven days. She was not in the hospital the first time. I permitted her to leave her quarters and shortly after she was taken quite sick again with the same thing and I sent her to the hospital where she was under my care and she was in the hospital about two weeks with bronchial pneumonia and this so-called influenza. That was the so-called Spanish influenza that was epidemic at that time. 'Epidemic' means generally prevalent disease, one that was common at that time. I recall Miss Hill personally very well. Prior to the time she got sick,

like all the nurses she was working and I didn't pay much attention to any of them, just talked to them—she was working all right. She was a very good nurse. There was nothing at all abnormal or unusual about her that I noticed. The conditions under which the nurses were working in October, 1918, just prior to Miss Hill's coming down with the influenza—we had the hospital full of these patients and we were all working over time. I myself worked thirty-six hours without a stop."

The Adjutant General's Office (A. G. O.) report further corroborates appellee (R. 65).

A. G. O.—Degree of Disability Inadmissible.

(NOTE: The statement on page 64 of the record, as to the degree of disability (A. G. O.) is clearly inadmissible and entitled to no weight whatsoever.)

See:

Demeter v. United States (App.D.C.), 66 Fed.(2d) 188;

United States v. White (C.C.A. 9), 77 Fed.(2d) 757;

United States v. Stephens (C.C.A. 9), 73 Fed.(2d) 695.

Appellee's condition on January 1,1919 (the date the jury found total permanent disability).

The record shows that appellee did little or no duty after her illness in the Army Hospital and prior to her discharge (See R. 30-31).

Concerning her physical condition on or about January 1, 1919 (date of jury's verdict) appellee testified (R. 30-31):

"Then I had orders to come back to the States. When I came back to the States I landed at Hoboken. I didn't go back on duty then. I wasn't able to do duty. I was in bed all the way home on the boat, and when I arrived in Hoboken I was sent to—it was the Army Hospital at that time, but it was the old Polyclinic Hospital. I don't remember what number—I believe, Army Hospital No. 4.

"I stayed there a few days. I wasn't able to do duty, and I stayed there only a few days when I was sent to the Hotel Albert. At that time the Hotel Albert was the headquarters for overseas nurses. In other words, the Government was using it for a barracks for the nurses. I wasn't on duty at all at the Hotel Albert. I spent my time in bed there. I left the army —I left New York the latter part of January of that year. I was sick in bed when I was notified to go down to get my traveling orders, and I stood in line with 300 other nurses to get my traveling—I was not given an examination at the time I left the Hotel Albert to go to my home. I didn't see a doctor. If he was a doctor I didn't know it. The man that gave me my traveling orders, he didn't—he didn't appear to be a doctor. When I left I left the Hotel Albert for home the latter part of January. I was discharged from the army February 3, 1919. I was in the army during the time I was on the way home and after I got home."

Appellee's condition upon arriving home from the Army (January 16, 1919).

In this respect appellee testified (R. 31):

"After I got back to Little Rock I rested for awhile. I didn't feel good at all when I went to Little

Rock, and, of course, I rested for awhile and I was examined by Dr. Kirby and Dr. McGill. This was along the 20th of January when I was examined in St. Luke's Hospital. I arrived back in Little Rock on the 16th, but I had been home a few days before I had this examination. I went there for this examination because I was sick. They were the doctors that I had worked under before I went away. I had a rise of temperature every day. I had a very severe cough, and my heart was pounding every time I did any exercise of any kind, and I had these weak spells at any time I tried to go up and down the steps very much, and I would almost collapse. In fact, I had to be helped up the steps to the X-ray rooms in St. Luke's Hospital at the time that my chest was X-rayed. That examination was prior to my discharge. It was around the 20th of January and my discharge was February 3rd.

Dr. Kirby and Dr. McGill treated me for my chest. They treated me also for my stomach which was upset. They prescribed something for my stomach. Dr. Kirby gave me several different prescriptions. Dr. Kirby is now dead. He passed away in 1922. He gave me a prescription for my cough."

Appellee's physical condition immediately after her discharge from the Army.

In this respect appellee testified (R. 32):

"After that I tried to work and follow my occupation as a nurse. I tried to work—I registered for duty. It must have been two or three months after I had been home when I registered for duty, and for light cases—not night work. I worked in Little Rock on short cases. I don't believe I was

ever able to continue one case that lasted longer than three or four days, because I was weak. I couldn't go up and down the steps without resting. My heart pounded and I coughed. The doctors advised me to go to a dry climate for my health, which I did. I stayed around Little Rock before I went West from the time that I arrived home in January until around the 1st of November of that same year, 1919. There is no way to say correctly how much I worked during that interval from January or February up until the time I left in November of 1919—how much I actually worked, putting in time, working on the job for which I was paid. I worked very little. I worked three or four days at a time. I didn't work enough to pay my expenses at any time. It wouldn't amount to a half or third of the time. I wasn't registered for duty half of the time—I didn't work one-third of the time while I was in Little Rock because my temperature was never normal during that summer. I only registered for duty half of the time, that means I could work if a call came in, that is what it would mean if I was registered. After I had been home for two or three months is when I registered. My name would be off the register at different times until I left in November, 1919. When I went on a case I would take it off. It might not be put back on for—for instance, if some friend should call me on duty, not call me through the registry, my name being on the register didn't mean an awful lot. Any time I wanted a call from the registry I would call up and register. After I had once placed my name on the nurses registry, then every time I had gotten a job I would have to wait and finish the job before I could be registered again . . for call. My name would be there but it wouldn't be for call—on call. In other

words, until I notified them that I had finished a job they wouldn't expect to call me. When I was on call I was available for duty. I was on call very little of the time that summer, I couldn't say how much. I was available to go out on a case from the time I registered, which was two or three months after I came back, until I left in November 1919. I wasn't on call one-third of the time, I don't believe. Of that one-third of the time that I was on call, I worked very little during that summer. I couldn't say just how much I worked, but I worked very little. I didn't work enough to pay my room and board, I know that much."

Also (R. 35):

"Going back to the time of my discharge, I spoke of having certain symptoms. I said I had pleurisy. I had pleurisy from the time I had pneumonia while I was in Liverpool. The left part of my chest is where I had these pleurisy pains. The pleurisy pain was in the left (illustrating). Sharp pain in my left shoulder any time from exertion. I am indicating the lower part of my back, the left side (indicating), is where I had the most trouble with pleurisy pains. The sharp pain in my left shoulder, that was different. Any time from exertion it was in my left shoulder. The first time I noticed that was the time I collapsed on the steps when I walked out to the big gate in Liverpool. I still have those pains. I have a sharp pain in my shoulder now, yes. I have the pleurisy pains occasionally. Concerning how frequently I would have these pleurisy pains from the time I had them in England in 1918 up to the present—any time from exertion; going up and down the steps; anything that would cause shortness of breath. I am

speaking both of the pleurisy pains and the pain in my shoulder; the pleurisy pains and the sharp pain in the shoulder are both brought on from exertion, from walking up and down and going down the steps, especially if I try to hurry.

Going back to the time I was discharged, so far as bodily sensations are concerned, with particular reference to my health, I felt, well, at times I felt a little better than I did at other times, but I continued to catch cold very easily. I have a cold now. It has been that way throughout all these years."

Appellee left her home and friends in Little Rock, Arkansas, for Tucson, Arizona, on account of her poor health.

She testified (R. 33-34):

"I left Little Rock on account of my health, cough and these continuous weak spells that I would have. I thought that I might find a climate that would be better for me. I went to Tucson. I came by way of El Paso but I didn't stay at El Paso at that time. I did not have any acquaintances or friends in El Paso. I did not have any friends or acquaintances in Tucson. I had never been there. I didn't know a soul in Tucson. I remained there—arrived there after the first of November, 1919, I stayed the latter part of February, 1920. While in Tucson I tried to work at different times but I had pleurisy something terrible in Tucson, and I coughed all night. And I would put my name on call and if I was called out on duty, I wouldn't work because I had no one to befriend me there, and I couldn't stand the work at all. I probably worked two weeks out of the four months; no longer than that."

Getting no better in Tucson she went to El Paso, Texas, although not knowing a soul there.

The record (p. 34) shows:

> "I left Tucson because I wasn't any better. I didn't seem to be any better there, so I decided I would go back to El Paso and try. I didn't have any friends at all in El Paso. At that time I didn't know a soul in El Paso."

Her physical condition while in El Paso.

While trying to learn X-ray work in vocational training appellee testified (R. 34-35):

> "I would have to stop to gasp for breath any time I tried to wind this table up. It was just a flat table; it was used for X-ray. When they used it for the fluoroscope we would have to wind a big lift to bring it straight up and down, in other words, it would have to be vertical. It was rather a heavy table. It would wind up like all X-ray tables. The effect of this winding of that table had on me personally was to make me very short of breath. I couldn't wind it up without resting two or three times during the time I was trying to wind it up, and of course that would delay everything and Dr. Cathcart didn't like me to wind the table up."

Appellee's present physical condition and its duration since November, 1918.

Appellee testified (R. 36-37):

> "I catch cold very easily, and I cough, and then it seems to get a little better and I continue to have these weak spells. Describing these weak spells, well, from any exertion like going up and down the stairs, work-

ing for a few hours at a time, all of a sudden I turn weak and sometimes I get over it in a short time. There have been times when I didn't get out of my bed for three weeks when I had one of these weak spells. Concerning how long these weak spells would last when they first started — the first one was in Liverpool, England. I didn't get entirely over it that day but I felt well enough. Speaking in reference to these weak spells that I have described and how frequently they have been from the time I had this initial attack in England—no certain time. It might be—if I am not doing anything, if I am in bed, why of course I don't have them, if I am resting most of the time. The frequency with which I would have them are—any time from over-exertion; any time from work. I couldn't tell you how many of these spells I have averaged a year since 1917 or 1918, but I would have them often—as often as I exert myself. Every time I have tried to work I would have to go off duty any time I happened to be on a hard case. It has been oftener than once a month; sometimes I would have them every day. When they start they do not always last the same. As I have said before, one time was three weeks. I was too weak to go to the bathroom. Concerning the colds and how long they have lasted —no certain time; some times it was better in a few days, and sometimes it has been months. I feel like I have the same cold or concurrent colds. I am catching cold all the time. I have never been entirely over that feeling of catching cold all the time—cough in the morning. I am always weak in the morning. I have had that all the time since 1918. I am short of breath all the time. Sometimes I feel a little better than other times. Compared with the way I felt at the time of the last trial in October I feel a little better

now than I did last summer. I was in bed nearly all last summer, but I felt a little better during the past month than I did last summer, but still, I have had the weak spells. I have had the pain in my shoulder and the shortness of breath, and at times it seems my heart has stopped entirely. I will jump up in the middle of the night and I will get up and gasp for breath, and I will believe my heart has stopped for a space of seconds. That happens any time. I go to bed unusually tired. Of course, I have that tired feeling every morning when I get up—so tired, and tired in my chest, that I can hardly breathe, and at times I have felt I couldn't go on any longer when I was on duty; but, of course, I would go on as long as I could."

Appellee's industrial history since discharge.

Appellee, a trained nurse by profession before the war, faced with the necessity of sustaining herself in honorable circumstances, attempted from time to time, occasional employment as a trained nurse. The record however is replete with examples of heroic attempts to be self-sustaining, which efforts were invariably doomed to failure on account of her extremely poor physical condition due to her heart condition and her tuberculosis—either one of which diseases standing alone would be amply sufficient to constitute total permanent disability since the date of her discharge from the army.

It is respectfully submitted that taking a fair view of her spotty and fragmentary industrial activity since her discharge, rational minds could not reasonably differ over our contention that her work was not continuous and did not amount to following continuously a substantially gain-

ful occupation. The work she did attempt was not substantially gainful for two reasons: first, the amount of money earned was not sufficient to enable her to sustain herself according to the average American standard of living, and, second and far more important, if such work —no matter how pecuniarily remunerative—aggravated either her serious heart condition or her tuberculosis, and hastened its progress, made it worse and shortened her life, then it wasn't substantially gainful—no matter if she had received $1,000.00 a month, because money can't buy health—and good health after all is worth more than all the money in the world. We think the Government must have had just this in mind when it adopted the precise language of its definition of total permanent disability contained in the policy.

Concerning her industrial activities since her discharge appellee testified (R. 34):

> "While in Little Rock out of the six or seven months, I was on call at the registry in Little Rock, after I came back, putting it all together I probably worked three or four weeks out of that six or seven months."

and concerning her work in Tucson, appellee testified (R. 34):

> "I probably worked two weeks out of the four months; no longer than that."

and (at El Paso) (R. 34):

> "While I was in El Paso I did X-ray work while I was there. This vocational training I did in 1921 with Dr. Cathcart. This is vocational training under

the Veterans Bureau of the Veterans Administration, it was the Public Health at that time—it was the Federal Board for vocational training. I was in vocational training six or seven months. The government gave me vocational training—they advised me that it would be shorter hours and that I might be able to do the work.

I didn't get along so well in X-ray work. I found it very interesting work and I like it very much but there was a part of the work that was entirely too heavy for me to do, such as winding up the X-ray tables for the fluoroscope, the old fashioned X-ray tables had to be used for the fluoroscope, and that was too heavy for me to do."

and again (R. 37):

"Getting back to my industrial history—I covered 1919 and 1920. In 1919 I was in Little Rock; in 1920 I was between Tucson and El Paso. Then in 1921 I was also in El Paso. I left El Paso in 1922. In 1921 I had the vocational training. I didn't try to nurse, unless it was a couple of days at one time. The latter part of the year I worked two or three days during the latter part of 1921 as a nurse, but I had the vocational training at the beginning of the year. At that time work was plentiful. It was always plentiful; they were always calling for nurses. Nurses were scarce and work was plentiful.

In 1922 I went to Globe, and took a position in Globe, Arizona, I left El Paso because I was always looking for an easier job, something that I could do. I wasn't able to do the work in El Paso, and the nurses' registry in El Paso sent me to Globe, Arizona * * * was supposed to be an easy position. I worked

there six weeks or two months, I would say. I quit that job because I couldn't stand the work. It wasn't hard work but I was short of breath and I coughed all the time, and I had this severe pain in my left shoulder and pleurisy, and also the pain in the right knee that has bothered me. I first had the pain in my right knee in 1922 when Dr. Kirby removed my tonsils in 1919. Dr. Kirby removed my tonsils in June or July, it was in the summer. The pain didn't go out of my knee when he took out my tonsils. You see, I had a rise of temperature all that summer. It would be a hundred and a hundred and six-tenths all that morning, and he treated me and advised me to have them taken out. I didn't feel any different after than I did before. I had the pain in my knee and sometimes, when I got weak, at first I had to hold onto the bannister. After I was in this hospital six weeks in Globe I rested for a while, and I took a position in the Inspiration Hospital in Miami. I worked at the hospital in Miami three or four weeks. I quit because I couldn't stand the work. During the balance of 1922 I rested a little while and went to Kingman and I took a position. I couldn't stand the work there. In Kingman I was in a general hospital. I left there in November, 1922, and went back to Phoenix, and I had a severe cold. I worked in Kingman two months * * * October and November * * * I mean September and October * * * I left that job because I couldn't stand the work. I didn't feel any different on that job than I had on previous jobs. I had the same symptoms. I had a severe cough. After that I went to Phoenix. I had a severe cold when I got to Phoenix and had a high temperature, and I went to bed * * * still in 1922. The balance of 1922 I didn't do anything. I stayed in bed and rested and Dr. Tuthill in Phoenix

treated me. In 1923—the first of January 1923 I started to work for Dr. Wheeler at the Indian Sanitarium * * * that was a government job. Dr. Wheeler was a government doctor at the time in the Indian Service. I worked in the Indian Sanitarium until the latter part of July (1923) * * * I went to work the 1st of January, and I was there until the latter part of July; but I didn't work all the time. I had a two weeks vacation, and I was sick at different times. I was in the Indian Sanitarium several months. I didn't get along very well with my duties there in the sanitarium. I didn't have bedside nursing to do. I had dispensary work, and I would work a couple of hours in the mornings, and sometimes that would be all the work I would have to do; but I wasn't able to hold the job at all. I was weak and tired. I was weak and tired, I was too weak and tired to get out of bed some mornings, and I worked there every day I could work while I was there. I quit the job in July on the advice of Dr. Wheeler. He advised me to take an extended rest. I wasn't Civil Service there. I was temporary. A temporary appointee. My salary on that job was about $80.00 a month, I believe. That included my room and board. I don't remember what they deducted for room and board. The salary was supposed to be so much a year and so much deducted for my room and board. That was in July, 1923 I quit the Indian Sanitarium. The balance of that year I rested until the latter part of October, I believe it was, when I went to work in Hayden, Arizona * * * That is the Dr. Wheeler whose deposition is on file here * * * I worked in the Smelter Hospital in Hayden—I was there until April the next year, 1924. I was doing very light work there. Two or three weeks after I went there we didn't have a patient in the

hospital. I had to answer the telephone, and remove a cinder from a man's eye, or dress a finger, or do something like that, and receive the doctor's calls. That was my work for two or three weeks, and after I went there we had a few patients during the winter —a couple or three bed patients during the winter. When I wasn't working there and didn't have any particular duties to perform I rested in bed any time I had nothing else to do. This was permitted by my employers. They understood that I was to rest when I wasn't working. I had a bed in the hospital when I rested, and I could hear the telephone ring and the door bell ring and I could get up and answer, and go back to bed. I left that job because I couldn't stand the work any longer. I wasn't able to get out of bed —pleurisy and shortness of breath—that was April, 1924, I quit there.

The balance of 1924—I didn't work that summer. I went back east and spent the summer with my people there, back at Little Rock. That is not the first time that I had been back to Little Rock since I left there in 1919. I was back there every year during that time. They sent for me every year. Some time during the year I would spend two or three weeks back there. During the summer I had taken the Civil Service examination for the position at the Indian School hospital in Phoenix and the latter part of September I went back to Phoenix to the Indian School Hospital. I was not given a thorough physical examination in connection with that Civil Service Job, just a routine—asked questions. The Veterans Bureau had examined me in the spring of 1924—Dr. Fred Holmes. In the winter—it might have been in the winter of 1924, I believe it was—I held that job in the Indian School from the latter part of Sep-

tember until February. That is from September 1924, to February 1925. Well, the work—I didn't get along very well on that job. There again I had a bed. My room joined the girls' ward. It was a regular school hospital—school children were my patients and my room joined the girls' ward, and there again I had a cold. I had a telephone in one room; I could rest when I wasn't working, and answer the calls, which I did, and managed to get by as best I could until February. I quit in February because I couldn't stand the work any longer. I had pleurisy and this weakness, this shortness of breath, Dr. Wheeler, the government doctor in the Indian service, treated me while I worked at the Indian Sanitarium. No government doctor treated me while I was at the Indian school. The balance of 1925—I didn't do anything that summer. In the fall of 1925 I did a couple of private cases, short cases, when I felt like going out on duty. At times I had my name registered at the registry in Phoenix during this time. Concerning the method of registering at the registry: I registered at the registry. I went up there and told them I am a nurse and available for duty, and they registered my name. When I say on call I mean they have my name on the registry and somebody, we will say, comes in and asks for a nurse, and my name is there and they send me out on a case. The registry has a place to slip my name back to one side. I still belong on the registry, but I won't be on call. Suppose I take a case and am on the case for three or four days. Then I go off of it—I don't notify the registry until I am ready to go back on duty. If I am on a couple of days and go off, the rigistry wouldn't know anything about it for months. The registry keeps my name to one side until I notify them I am ready for duty again.

The balance of 1926 after I left the Indian School, I did some private duty nursing. During 1926 I registered for private duty nursing like the short cases. I did some private duty nursing. I was never able to take care of a case that was very hard, and worked only a few days at a time without rest. I have never worked a week straight at any time without rest. I never stayed on a case more than a week—not a week. I have never worked on a case more than a week. Sometimes, one day I wouldn't be able to go on duty next morning, wouldn't be able to get out of bed. Nurses were scarce during that time. There were a lot of calls for nurses. If I were to put all the days together when I did private nursing in 1926, it probably would not amount to four or five weeks during the year. I didn't work very much during 1927. I was sick in bed part of the time, and part of the time I was up. I felt a little better at times, and some private duty; never enough to pay my expenses at any time. In the winter of 1928 I was in bed practically all winter with a woman taking care of me. In 1928 I didn't work from Christmas, 1927, until April I believe it was, 1928, because I was sick in bed all that winter. The balance of 1928 I would take a short case occasionally. If I were to put all the days together I worked, it would be about the same as I had been working before that time. I would work a few days at a time and sometimes I would rest, and sometimes I was able to take care of myself, and I was ill, and then again I wasn't able to take care of myself. I worked when I felt like it and I couldn't say positively how many days I worked.

In 1929 I was sick in bed all winter—the winter of 1928 and '29—the beginning of 1929. I didn't work from January until the spring again. I was in bed

most of the time from the fall of 1928 to the spring of 1929 of that winter. The balance of 1929 I had a few short private cases, worked when I felt that I could. I did not work for any copper company hospital, either in 1929 or 1929."

And again (R. 44):

"If I were to put all the days together that I worked in 1928 doing private nursing, I couldn't say how many days I worked, approximately. Probably around six—four or six weeks, probably. I couldn't say for sure if that would be correct. But the longest period I ever worked in a stretch during 1929—I have never worked a week at any one time without relief since 1918 while ill with pleurisy and pneumonia overseas. I have never worked a week at any one time without relief. I had one or two private cases during 1930. I was in Phoenix all this time. After I came out with this patient to Los Angeles I went back to Phoenix immediately. I had my name on the registry at this time. I had belonged to the registry all that time. I had a couple of private duty nursing cases in the first part of 1930. I was sent by the nurses' registry to Superior, Arizona—sent by Dr. Swackhammer. If I were to take all the days together, putting all those days of private duty nursing together, up to the time I went to Superior—during 1930, I didn't work very much; probably two or three weeks. I started in to work at Superior the first of September, 1930, and I stayed there until the first of February, 1931. My duties on that job were general nursing—I did the buying of the groceries for the hospital—'phone orders. It was a very small hospital. We didn't have a patient in the hospital one time for six weeks, just

a small mining hospital. When I was supposed to be on duty there I spent my time—I had a bed in the hospital where I rested all the time. I could answer the telephone and the door bell, and it was opposite the dressing room door, and whenever a patient came in to have a finger dressed or have a cinder removed from the eye, I could get up and do that and go back and lie down, and I spent most of my time lying down. The Magna Copper Company owned the hospital. Concerning how I got along on that job as far as my health was concerned—how I felt, I always felt weak and tired and so tired in my chest that I could hardly get out of bed. At times I felt I couldn't go on any longer, but due to the fact that at times we didn't have a patient in the hospital, made it possible for me to stay on duty. And my knees gave me quite a lot of trouble that winter too. Dr. Swackhammer treated the rheumatic pain I had in my knee. It was treated by Dr. Swackhammer while I was there. During the rainy season it was quite severe and Dr. Swackhammer treated me. That is the same pain in the knee that I described as having in 1919. I left that job because I couldn't stand the work any longer. I couldn't get out of bed in the morning. I quit there in February, 1931. The balance of 1931 I rested. I came to Los Angeles—I came to San Fernando, California—that same year, 1931; that is a government hospital out there, at San Fernando. I was a patient in that hospital about eight months. I left there in November of the same year, 1931. They didn't give me any treatments, they just had me rest. I was in the T.B. ward there. I left San Fernando Hospital in November, 1931. I haven't done anything in the way of work since then."

There is, of course, abundant evidence in the record corroborating appellee, but bearing in mind the primary rule of evidence that one witness who is entitled to credit is sufficient to prove a fact (to the sole and exclusive satisfaction of the jury) we will not quote the same here.

Appellee's hospital record.

Besides the Army Red Cross Hospital at Liverpool, England, in 1918, appellee has been hospitalized or examined as follows:

St. Lukes Hospital, 1919 (Drs. Kirby and McGuire) (Examinations and treatment) (R. 84).

U. S. Public Health (Tuberculosis) Hospital, Ft. Bayard, New Mexico (3 months-1920) (R. 46).

U. S. Veterans (Tubercular) Hospital, San Fernando, California (8 months-1931) (R. 45).

Besides being treated by numerous private physicians.

Appellee's Medical Evidence.

The first doctor who treated appellee was Dr. (Major) Julian M. Wolfsohn, her commanding officer overseas, who treated her in November, 1918, at Liverpool, England. His testimony concerning his treatment of her we have already set forth above.

Dr. Wolfsohn again examined her in his office in San Francisco in 1935. Concerning her condition then, and the connection between her present illness and that of 1918, he testified by deposition (R. 67-68):

"The next time I saw her after that was May 16, 1935, in my office. I examined her at that time. At that time when I examined her I took the history of the

interim first. I recalled her at that time. She was a very personable young woman and I remembered her. I took this history of the interim from the time she left the hospital until the time she came to my office. Then I made a mental and physical examination also. I found that the important things were that in her chest, the upper left part of her chest, especially below and over the percussion note was high pitched as compared with the right and that the breath sounds were rather harshened. I also found that the heart was somewhat dilated, the point of maximum impulse was outside of the nipple line with the patient sitting up and systolic murmurs were heard at the apex. Also her blood pressure was 158 over 96, which is a marked increase. Her pulse rate was rather fast, 82. There was some vasomotor disturbances noted and she had particularly cold hands which were not moist. That is, I should think, the main body of the findings. As a result of that examination my diagnosis was—that she had a chronic pulmonary condition which was the result of the infection which I had treated before, in 1918. Concerning any connection between the condition found from the examination in 1935, and the condition found from the infection in 1918, the bronchial trouble in 1918 was in the same part of the chest and the history of the interim gave definite connection between the two. I am familiar with the duties of nurses. Basing my opinion on the condition found in 1935, and concerning the effect upon Miss Hill's health on her following her vocation as a nurse, as to whether or not it would be injurious to her health, I would say that in so far as the breath sounds were harshened and roughened in this area and high pitched percussion notes were noted over this particular area, I believe the local condition not com-

pletely healed and any physical labor she might do would be injurious to her health."

Dr. Kirby and Dr. McGill are the first two doctors who treated appellee at St. Luke's Hospital, Little Rock, after her discharge from the Army. Dr. Kirby died in 1922 (R. 32).

In his deposition, Dr. McGill testified (R. 84-85):

"Before the war she worked in St. Luke's Hospital as a nurse while I was working with that institution, two or three years. I observed her physical condition as I worked at the same hospital. She was a graduate nurse. Her physical condition when I knew her at that time was good. She was in good health, she was affable, agreeable and efficient as a nurse during that time. She was a successful nurse. I saw her after she returned from the war about January or February, 1919. On that occasion she came back to the hospital and consulted one of our staff members, Dr. Kirby, for the purpose of diagnosis and treatment. I had occasion to examine her at that time. We made a physical examination and the findings were rales of upper lobes of the lungs, a large heart with mitral regurgitation, otherwise known as mitral insufficiency which to an average man is a large and leaky heart. The examination revealed tubercle bacilli, a positive tubercle bacilli existed. We frequently examined hearts. A condition known as parenchymal, mottling and annular shadows—that's X-ray, and it means that there are spots on the lungs, silisolid, and annular means produced by tuberculosis. Such a condition existed in her case. I made the examination of her chest. I found—that's what we were talking about—that was a chest examination. Her pulse was

rapid, she had evening temperature, evening fever, fast pulse, low blood pressure. She had a cough. She had a lack of physical endurance. I made a laboratory examination of her sputum—it was a microscopic examination. It revealed tuberculosis. The presence of tubercular bacilli in the sputum is one of the best signs of active tuberculosis. I would call that active tuberculosis—pulmonary. I did not make any other findings at that time. I don't recall what her blood pressure was at that time. It was low, it has always been low. My diagnosis then, in 1919, of her condition, was pulmonary tuberculosis, active, myocarditis, and mitral regurgitation. My prognosis at that time was bad."

(In view of counsels' abandonment of their Assignments of Errors No. III, IV and V, we will not quote counsels' objection and the trial court's ruling found on pages 85-88 of the record.)

(Witness continuing):

"From my finding as to the condition of her heart, I would say that it was of a permanent character. From my examination of her heart, it was damaged to such an extent that her condition would not improve and from which she would not ultimately recover. From my examination of her tubercular condition that existed and whether I would consider it permanent or temporary—well, the heart condition would be considered permanent, however she might get arrest of tuberculosis. I don't remember that I advised her as to her physical condition at that time. She wasn't my patient but I examined her for Dr. Kirby. Advice was probably left to him. However, she was one of our favorite nurses and her case was

discussed at a meeting, or maybe more than a meeting, of our Hospital Staff and it was the opinion of all of us that she should go to a higher climate and that she shouldn't attempt to do anything. She was not able to do the work of a nurse at that time. The treatment that was prescribed for her—rest was considered the most important thing for the heart and the tuberculosis too; change of climate and diet for tubercular condition. I made a record of my examination that I made of her at that time. I have not that record now. I do not know where it is. I may have furnished the Veterans Administration with the record of that examination. I gave some of those records to somebody. I don't recall how long Miss Hill was under my care at that time. She must have been around there several weeks. After she left the hospital she went West—it must have been El Paso. I don't recall when she left Little Rock. It was in the same year. I would say she went in the winter or early spring. I do not recall the exact date I examined her in Little Rock after her discharge from the Army—my impression is that it was just a few days. I recall testifying in this case once before. I stated in my former examination that I examined her about the first or second week in February of 1919. I think she attempted to do some nursing at the Hospital in Little Rock after she came back from the war and before going West and she couldn't do it. She was examined and found to be dangerous to have in a Hospital even if she could have worked. I don't think she tried to nurse anywhere else other than at the hospital, and her orders given were not to nurse after her condition was found out.

Then I examined her subsequent to 1919. That examination was made in 1921. She had been away

and she returned back to Little Rock from El Paso. When she returned that time I examined her with X-ray and made the physical examination. I found—about what my findings were at the previous examination. Little or no change. I don't remember that I examined her sputum at that time, but I decided that she was still active and one of the ways of determining whether tuberculosis is active or not is the finding of tubercular bacilli in the sputum. I took an X-ray of her chest in 1921. The X-ray revealed about the same as at the first examination. I had occasion to examine Miss Hill subsequent to 1921. That was on January 6, 1936. After my examination of Miss Hill in 1921 I advised further rest and her return to El Paso and further treatment out there for tuberculosis. I advised her to continue the treatment she had been having. She was not able to do any work at that time. In my practice I have had occasion to know the requirements of a job of nursing. She could not do that job in the manner satisfactory to a well qualified nurse. She was qualified by training to do nurse work as required by our hospital. She was not physically fit to do that character of nursing after her return from the war. When I examined her in 1936 I found on that examination—the lungs had moist rales of both upper lobes with consolidated area in both lungs. The heart was very large and there was a mitral regurgitation. She had a cough, evening rise of temperature, and a sputum containing tubercle bacilli. The pulse was rapid and the blood pressure was low, being 90/70. No improvement in lungs or heart since last examination. From my examination of her at that time I would say that her condition had not improved over her condition at the time I first examined her after her return from the Army. I examined her on

three occasions. Her condition had not improved over the previous conditions at former examinations. Her condition from the examination made in 1936 had not advanced in severity from her condition in 1921—they were just about the same. There wasn't much difference. It was just about as severe. The trip out here caused her to have fever. Any exertion caused her to have fever. The mitral murmur was not more pronounced at the time of the last examination than before—but it has always been so pronounced that even a novice could hear it. I took an X-ray of Miss Hill in 1936. I do not have one of the X-rays made at former examinations. Bearing in mind Miss Hills physical condition as I observed it at the time she went into the Army and my physical examination that I made of her after she came out of the service, in my opinion her tuberculosis began while she was in the Army. In my opinion at the time I saw her in February of 1919 her tuberculosis had existed at that time for a few months. From my association with Miss Hill prior to the time of her entry into the service, she did not complain of any heart disorder. From my examination of her condition after her return from military service, and of my knowledge of her condition before she entered into the service, I would say that her heart condition became serious while she was in the service. With her heart condition such as she suffered, she could not carry on physical activities and work as a nurse. If she tried to work with a condition like she had, the result would be fatal. She was advised by me that if she attempted to work as a nurse it would perhaps be fatal to her or result in the serious impairment of her health—her condition was explained to her so she would understand why it was necessary to take a rest for months and months,

years and years, if necessary. She was acquainted with the danger of attempting to work. The effect contemplated work as a nurse or physical activity would have upon her heart condition if she had attempted it—it would make it worse.

Bearing in mind Miss Hill's physical condition and her condition upon my examinations of her, in my opinion the possibilities of Miss Hill being cured of her physical ailments, if ever—the heart diseases were absolutely incurable and on account of these diseases it was very doubtful if the tuberculosis would ever be arrested. I don't think she could ever become cured of her tubercular condition—I didn't think it then and I don't think it now."

And on cross-examination, Dr. McGill testified (R. 93-97):

"In my first examination I said I found rales of the lungs, tubercle bacilli in the sputum and a large heart. I got the impression that she suffered from mitral insufficiency and mitral regurgitation from the big heart. Her heart was so big the valves would not meet. I think the heart was enlarged so that those valves would not close. Possibly the same thing that caused the tuberculosis caused the heart to enlarge, that is, probably the flu she had while in the service. Large hearts, tubercular conditions and valvular diseased hearts come from infections, and the infection she had was flu. My X-ray showed trouble with the valves of the heart. The X-ray showed a big heart, but those leaks are easily detected by putting the ear up against the chest, or a stethoscope. I made that kind of an examination."

At this stage of the trial the following proceedings took place:

"Q. In most instances, Doctor, isn't nature's effort to overcome valvular heart trouble successful? In other words, wouldn't it become compensated?

A. It hasn't become compensated in Miss Hill's case.

Q. That isn't the question I'm asking you, Doctor. In most cases isn't nature's effort to compensate that nature of trouble successful?

A. It is successful in that small percentage of cases in which the heart disease improves.

Q. What does it mean to compensate a heart?

A. It means that the heart get strong enough that it can beat with such terrific force that it can still force the blood through the body even though there is a flowing back or regurgitation of blood with each beat of the heart. Persons who have slight leaks of the heart may get compensation sufficient to lead a fairly active life by being careful not to over-eat or over-exert.

Q. Isn't it true that many men or women afflicted by heart trouble such as you found in your first examination of this patient, go on through life and live their allotted time and die of some other disease?

A. No.

Q. That isn't true?

A. No, not with a person with as bad and as big a leak as this person had.

Q. What do you mean by big leak?

A. So much of the blood is flowing back that every beat of the heart couldn't be overcome by compensation, and the lady wasn't able to work.

Q. That's not responsive. The condition that you observed at that time was such, you say, that she couldn't do nursing?

A. That is right.

Q. But nursing is rather a strenuous task?

A. It is.

Q. It requires heavy lifting and loss of sleep?

A. Absolutely.

Q. Are you familiar with any other calling a person of her education could follow without danger to her condition and her heart?

A. No.

Q. This patient, in your conception, has gotten considerably worse since you testified before?

A. No, she is about like she was.

Q. I mean your conception of her condition since you first examined her.

A. I have had from 1919 to 1936—a period of seventeen years. If you have had somebody under observation for seventeen years, and no improvement in heart or lungs, it will be reasonably certain that there will never be.

Q. I'm talking about the first time you examined her. Your conclusion now is, according to your testimony, that she was at that time in a great deal worse condition than you thought at that time she was.

A. Yes, subsequent advance has shown us that her condition is even worse than we thought it was.

Q. You reached that conclusion, yet during this seventeen year period you examined her twice, once in 1921 and once in 1936?

A. Yes.

Q. You say you advised rest for her?

A. Yes, rest is the most important thing.

Q. What did her physician, Dr. Kirby, advise?

A. That was his advice, too. In fact, that was the advice of the whole staff, including Runyon, Kirby, myself, Carruthers and others.

Q. Now, at the time you first examined her you say that she had tubercular bacilli in the sputum?

A. Yes.

Q. You got that by microscopic examination?

A. Yes, that's right.

Q. Does that indicate an active tubercular condition?

A. Yes.

Q. Would you say that a patient would have active tuberculosis when the microscope reveals bacilli independent, or whether or not the patient had fever?

A. No.

Q. Isn't the presence of some fever the symptom of active tuberculosis?

A. It is.

Q. Isn't tuberculosis in its incipient stage curable?

A. It is arrestable in many cases. However, that was incurable because of her heart condition.

Q. Now, Doctor, you had not known anything about her condition between 1921 and 1936?

A. Except what she told me.

Q. So far as you know during that period the tuberculosis may have become arrested and the heart compensated?

A. The tuberculosis may have become arrested, in fact it might have been arrested two or three times in that period, but the heart has never been compensated because it's just like it was. The blood pressure is too low for it to be a compensated heart. The blood pressure is so low that the patient could not do anything."

Dr. A. D. Long examined and treated appellee in El Paso, Texas in November, 1920, for her heart and lungs. He testified (R. 102):

> "I recall what I found—I recall that she had very mild tuberculosis and heart lesion. It would endanger her recovery more, and her chance of recovering her health if she worked or engaged in any kind of strenuous work such as nursing, and it would probably make her heart condition worse to engage in a strenuous exercise."

And on cross-examination Dr. Long testified by deposition (R. 103):

> "At the time I made examination of the plaintiff in this case, in my opinion she was suffering from the moderately advanced stage of tuberculosis."
>
> * * * * * * *
>
> Q. You stated her heart condition was a permanent condition?
>
> A. Yes."

And on redirect examination (R. 104):

> "At the time of the examination Miss Hill was suffering from active tuberculosis—that was my opinion. It was not an arrested case. The condition of her lungs would have something to do with her heart condition. It would complicate it—it would be worse than either one would be by itself."

Dr. W. S. Sharp testified by deposition that he examined the appellee in February or March of 1919 (Counsel on both sides agree this was February or March 1920). He testified (R. 106):

"On my examination of Miss Hill at that time I found—well, the occasion of that examination was that I secured Miss Hill to attend this Mr. Ralph Parker, who was a personal friend of mine and while nursing this case Miss Hill had a complete breakdown and I was called to see her at the hospital. I examined her and found that she had an arrested case of tuberculosis, (quiescent). The situation seemed to be that this condition was aggravated by her work and then she also had a heart condition that contributed to her breakdown materially. Mr. Parker was suffering from double pneumonia. Miss Hill was also suffering from heart ailment. She had, as I recall it, myocarditis and a heart condition aortitis, an inflammatory condition of the aorta. After I examined Miss Hill I advised her to take an extended rest. She was unable to continue with her work in this particular case."

And on cross-examination Dr. Sharp testified (R. 107):

"My examination of the plaintiff was in 1919 (1920). I had an electro-cardiograph. She had myocarditis. It is a diseased condition of the heart muscle which results in weakening of the heart muscles."

And again on cross-examination (R. 109):

"Q. What effect, Doctor, would the industrial activities of the plaintiff Frances Hill, that is carrying on her occupation, have upon the tuberculosis condition?

A. I would say it would aggravate it.

Q. And what effect would her industrial activity have upon the heart condition?

A. My answer would be the same."

Dr. A. J. Wheeler, a Government physician specializing in tuberculosis and now employed at the Government's Albuquerque Indian Sanitorium, testified (R. 120-121):

> " I know the plaintiff, Frances Hill. I first became acquainted with her about 1923 in Phoenix, Arizona. At that time I was connected with the Phoenix Indian Sanatorium. She was a nurse on my staff. She was employed by me on my staff at the Sanatorium from May, 1923, to July, 1923. I examined her lungs during the time she was employed by me. The symptoms which led to my examining her lungs at that time—she felt tired, coughed, had slight expectoration, was nervous, weak, had some pain in her chest, with a slight afternoon temperature. Examination showed moist rales in the upper lobes. My diagnosis as to her physical condition at that time based on my physical examination, was pulmonary tuberculosis. The upper lobes of her lungs were involved with pulmonary tuberculosis. The condition of her tuberculosis at that time —I thought it was active. I do not recall how many examinations I made on Miss Hill during the time she attempted to work for me. Her employment was terminated—I advised her to stop work. My advice to her to stop working was based upon my knowledge of her lung condition. The kind of treatment it was advisable for a person in her condition to take was—well, rest until the activity and the disease should disappear."

Dr. D. S. Duncan, also a physician in the Government Indian Service, in a deposition taken by the Government but read in evidence by plaintiff, testified that he made a routine examination of Miss Hill when she went to work for the Indian School (R. 128):

"We hired her knowing her history and knowing that there was a possibility of her having tuberculosis, and on the basis of the report from the Veterans Bureau—Dr. Fred Holmes, who is a tuberculosis specialist, having made same, and being a specialist, could not dispute his word, and in addition, the examination that I made."

And on cross-examination Dr. Duncan testified (R. 128-129):

" I knew she had tuberculosis when at the sanitorium—it was common knowledge that she had been diagnosed tubercular. When she came to me she needed work. Mr. Brown and I talked it over before we hired her. There was some question as to her health, and whether she was able to work, and we took that into consideration but thought that with the help of the Indians and due to the fact that she had only to supervise, she could handle it. Her record was good while employed at the sanatorium and she was a competent nurse. She really wanted to work. I understand she needed the work and being an ex-army nurse we felt we should give her a chance, if she could manage it. I figured the duties were not very strenuous and she could do them, because it was mainly supervision."

Dr. Harry Cohn, now head of the tuberculosis department of the Los Angeles City Health Department and one of the outstanding tuberculosis experts of the United States as shown by his qualifications, testified as follows (R. 132-134):

"I had occasion to examine Miss Hill, the plaintiff in this case. I first examined her in December, 1929.

She came to the office stating that she was taken ill on her way from Phoenix; came in for an examination. I examined her at that time. She consulted me merely as a physician for treatment. Upon my examination I found at that time she was suffering from an active tuberculosis. She also had evidence of heart damage; she had a pleurisy at the base of the left lung. Her tuberculosis at that time was classified as moderately advanced. Lung tuberculosis is generally classified three ways: as a minimal, or early; moderately advanced and advanced. Her case was moderately advanced. Concerning her heart condition she had evidence of a widening of the large tube which leads the blood from the heart, and an enlargement of the heart, and the inability of the heart muscle itself to respond in a satisfactory way to any sort of exercise or effort. Her condition indicated a serious heart condition. Her condition of tuberculosis was serious at the time I examined her in 1929. I examined her again in April, 1935, last year, after this suit was filed here. When I examined her in 1935—at that time she had an active tuberculosis involving the upper lobe, which was approximately the upper third of the left lung. She had, of course, the same pleurisy that was noted previously and she had approximately the same heart condition, although it appeared to be somewhat worse at that time. I examined her again the latter part of 1935. In October, I believe. The condition of her health then — well, her lung tuberculosis had quieted down somewhat. In other words, the findings which indicated an active tuberculosis on other examinations were not present at that time, so the disease was marked "quiescent." Her heart condition and her inability to respond to exercise was present at that time as it had been on all examinations. I don't

recall the date I next saw her, but I have seen her several times this year. Her condition at the present time—I believe the tuberculosis is quiescent. That is, it is not definitely active. It is one of those border line. That does not mean she is cured."

On pages 134 to 135 of the record, Dr. Cohn gives an exceptionally clear picture of the disease of tuberculosis from the layman's standpoint.

Regarding the relation of Miss Hill's heart condition to her tuberculosis, Dr. Cohn testified (R. 136):

"In Miss Hill's case, the significance her heart condition has so far as tuberculosis is concerned—and vice versa—well, her heart condition has this particular effect upon her lung condition: the circulation, of course, in a heart which is not an adequate pump, is not so good as it would be in a pump that is competent. The tendency is for the blood to collect in the dependent portions of the lung and produce some congestion there. On the other hand, her tuberculosis, with a production of poisons, does injure the heart just as it injures other parts of the body, so that there is produced a more or less vicious circle, one acting to the detriment of the other. In other words, having this heart condition, she would have much less of a chance to make progress in a tubercular condition than if she didn't have a heart condition. The reverse of that is true so far as the heart condition is concerned, that it is aggravated by the tubercular condition. Her lung ventilation is rather handicapped by her lung condition. In other words, there is that shortness of breath in a pair of lungs which should be resting."

After hearing the hypothetical question, Dr. Cohn testified (R. 137-141):

"* * * in my opinion Miss Hill's tubercular condition began or started or had its inception following shortly after the attack of flu and pneumonia while in service. I believe it has been testified to that this was in October and November, 1918, in Liverpool, England. Bearing in mind those facts that it was testified Miss Hill was discharged from the army on February 3, and returned to her home at Little Rock, Arkansas around January 20, 1919; that at that time she was examined by Dr. McGill and found to have a positive sputum with X-ray of the lungs showing infiltration and other definite evidence of tuberculosis; that she also had a mitral regurgitation—damage to the mitral valves of the heart. Assuming those facts and the other facts that I am familiar with in this case, in my opinion the degree of advancement of her tuberculosis at the time she came home from the army and was examined by Dr. McGill, and he found positive sputum, which means sputum is stained with a dye and put under a microscope, and the presence of tubercular bacilli is shown up through the glass, that is positive sputum, and that is one of the definitely unquestionable evidences of tuberculosis—assuming that she had that positive sputum and the X-ray showed definite infiltration in various parts of the lung, and also she was complaining of pleurisy pains in the lower part of the lung. Assuming those findings in connection with the hospitalization and the trouble she had had with the flu and bronchial pneumonia in France, I would say that the degree of advancement in the tuberculosis in the spring of 1919, particularly on or before February 3, 1919, was moderately advanced.

If she was moderately advanced, and assuming those facts of the findings to be true,—and assuming that I am entitled to take into consideration the subsequent history and present condition from my own examinations—looking back on the case in retrospect, the chances or probabilities of her being cured or completely arrested of tuberculosis in 1919, February 3, even had she taken the best of care and gone to a sanatorium and done everything possible—it is my opinion from those facts, that it would not be good. I mean by that, that the probabilities were very much against her becoming a case of arrested tuberculosis even if she had taken the best of care.

At the present time I do not think there is a reasonable probability of her getting over this tuberculosis and becoming what is known as an arrested case. Concerning the fibroid type of tuberculosis which has been testified to in various findings that these doctors on examination found—nature is attempting to throw up scar tissue and wall off this tuberculosis. In other words, there are two types of tuberculosis: the soft spreading type, and the type that scars up as it goes along. We may have a tubercle here and scar tissue —tubercle forming here (indicating) and an extension along the other side and more scar tissue forming. That is what they call a fibroid type of tuberculosis. I believe from the history of this case as shown by the evidence in the court room here, that the tuberculosis was incipient or beginning in the fall of 1918 after she had the bronchial pneumonia, and by February, 1919, it had become moderately advanced. Concerning the test you put a person through to ascertain and determine whether or not they have attained a case of arrested tuberculosis, where it has previously

been active—the patient should have no symptoms referable to their disease. They should have no tubercle bacilli in their sputum. You take X-ray films, and the X-ray films should show that the spots are at least stationary or healing and the patient should demonstrate ability to take a prescribed amount of exercise daily over a specified period of time. The first examination I made of Miss Hill, I found tubercle bacilli in the sputum. I have not been able to find it since then. It does not mean a man does not have tuberculosis just because there was no tubercle bacilli in the sputum. If there are tubercle bacilli in the sputum, it means there is an ulceration somewhere discharging tubercle bacilli in the bronchial tubes. A man may have extensive tuberculosis without tubercle bacilli in the sputum. If you find positive sputum, you do not have to go further. I examined her heart—I had measured her heart. I have listened to it with a stethoscope. I have had her take bending exercises and straightening up exercises, testing the heart response, taking her pulse rate before and after, and after rest, and have taken her blood pressure on many occasions. So far as the measurements are concerned, her heart is not normal in size. In that respect I found the left side of the heart, that is that portion of the heart which pumps the blood into this large blood vessel supplying the entire body, called the aorta is enlarged. That is what we call an enlargement of the left ventricle. Now, the aorta, this tube (indicating on chart) is also wider than normal, and that is the aortitis. Her heart, that is, the measurement across this way (indicating on chart) the transverse measurement, is approximately an inch larger than normal. The last time I examined her heart was today. I used a steel measuring stick in

order to be able to see it under the X-ray. I had her in front of the fluoroscope. When a person is in front of a fluoroscope it is possible to see the action of the heart and aorta. You visualize the action of the heart in front of the fluoroscope. In other words, you see the heart beat and pump. There is nothing abnormal with her heart as I observed it except the rate of the heart is much faster than the normal rate. In other words, the normal rate for a woman of her age is approximately 78 to 82, while her heart rate is always above 94. The rhythm, instead of being a normal rhythm, is inclined to be irregular. Her pulsations are not normal. The significance that that has in connection with heart disease—well, it shows there is some damage to the heart muscle. In other words the heart muscle, instead of being truly muscular tissue, is in part scar tissue. Basing my opinion upon the evidence in this case, not taking into consideration the diagnosis or conclusions of other doctors, in my opinion she was suffering from a serious and incurable ailment for which rest was the prescribed treatment, and which would have been aggravated by work of any kind, at the time of her discharge February 3, 1919. That disease was a degenerative heart disease and she was suffering from a moderately advanced lung tuberculosis; chronic pleurisy."

And on cross-examination Dr. Cohn testified (R. 144):

"Regarding this damage to the heart that I found in 1929, which condition still exists, and whether her heart condition was easily detected—all you have to do is to take one glance at it under the fluoroscope and know that it is a badly damaged heart. Suppose I had not the advantage of a fluoroscope—that I just made a stethoscope examination—and whether or not

I would say it was easily detected—well, that is again a question of the time you picked the heart up. There are probably some times when the heart is relatively quiet and other times when the heart would be quite stormy. That would depend upon the time the doctor put the stethoscope on the heart."

Dr. Chas. O. Young, who examined appellee in 1935 and 1936, testifying as a heart expert after hearing the hypothetical question, testified (R. 182-183):

"* * * plaintiff's heart condition was the cause and had its inception at the time when plaintiff had influenza in 1918. In my opinion assuming that early in 1919 when plaintiff was examined by Doctors Kirby and McGill she had blueness of the lips and shortness of breath, plaintiff had a damaged heart at that time from which condition there was no probability of a cure. Assuming the testimony I heard in the court room to be true, and basing my opinion upon the findings of the physicians that had examined plaintiff in 1919 until date of trial, plaintiff was suffering from a serious and incurable ailment for which rest is the prescribed treatment and which would be aggravated by work of any kind at the time of her discharge on February 3, 1919, I would classify the heart condition from which plaintiff was suffering at that time as myocarditis and mitral insufficiency."

Dr. Samuel E. Welfield, an internist, after detailing his examination of Miss Hill, testified (R. 186-187):

"Her heart: The apex beat was in the fifth left interspace about three to three and a half inches from the costal margin, or the middle of the chest. Upon

auscultation, listening to the heart with a stethoscope, there was a marked mitral murmur heard with evidence of mitral regurgitation.

The aorta was tremendously enlarged. I took a ruler and measured the aorta and its transverse diameter, and it was well over four inches, which would be approximately ten and a half centimeters.

The mitral heart, or the left lower border of the heart, was away over to the left side and beating quite rapidly. The beat was quite rapid. It is possible in the fluoroscope to see the heart beat. You can see the heart contract and relax and contract under the fluoroscope. The fluoroscope is where they place the patient between the X-ray tube and the examiner, and you can see the shadows reflected on the screen, the same as you do on a moving picture. Now the diagnosis: Chronic laryngitis. That is, the larynx and the voice box and the tissue in that voice box is inflamed, which produces a huskiness or raspiness of the voice when a patient speaks. Chronic pulmonary tuberculosis, apparently quiescent at this time; chronic aortitis, chronic myocarditis, mitral regurgitation. Evidently the crepitation in the knees is due to a mild arthritis. As to what causes arthritis—usually any infectious disease will precipitate the incipiency of arthritis. Tuberculosis would cause arthritis. (The doctor then stepped to the blackboard and drew a diagram illustrating the various valves of the heart, and the aereation of the blood from the heart to the lungs.)''

Dr. Welfield heard the plaintiff's evidence also the depositions containing Dr. McGill's findings in 1919 and the other doctors' findings and testified as a medical expert from these hypothetical facts.

That this is an approved form of procedure is now established.

See

United States v. Linde, (C. C. A. 10), 71 Fed.(2d) 925, 926;

Putney v. United States, (D. C. Colo.), 4 Fed. Supp. 376, 378.

See also:

United States v. Sessin, 84 Fed.(2d) 667;

United States v. Woltman, (App. D. C.), 57 Fed.(2d) 418.

Testifying as a medical expert and basing his expert opinion on these hypothetical facts, Dr. Welfield testified (R. 191-193):

> "I have sat here through the testimony for the past 2 days. Assuming the testimony I have heard to be true, taking the facts I have heard as constituting the so-called history of the case, and assuming that the findings of the doctors—Dr. McGill, Dr. Sharp and Dr. Long, and these various other doctors who examined her and treated her from time to time, and also the findings of these Government doctors as manifested by these Government reports I have heard—but not taking into consideration the diagnosis, or the conclusions of the doctors, in my opinion Miss Hill was suffering from chronic myocarditis, mitral regurgitation and chronic pulmonary tuberculosis at the time of her discharge, February 3, 1919.
>
> If she had taken care of herself, meaning by that absolute rest over a period of years, in my opinion there would not have been very much change in her condition than exists today. I think that she is worse

today, so far as her heart condition is concerned, than she was in 1919. As to how much worse—well, the heart disease is a progressive condition. She embarrassed that condition of that heart by attempting to work at various times, and with a very serious effect on the heart. The work that she attempted to do, required of a nurse, sometimes requires strenuous work. And any strenuous work would have a deleterious effect upon her heart, or any heart condition.

I heard her testimony to the effect that she had, what she described as, an easy job working in the hospital for the copper company, where she would lie down most of the time and answer the telephone, and about all the duties that she had for a time would be to bind up a lacerated finger or take a cinder out of the eye, and at times they would go six weeks at a time without a patient in the hospital. That was very light duty and that would not have very much effect upon her heart—that particular position. Other positions, where she was required to stand on her feet or be on her feet for any length of time, would have a deleterious effect on her heart. I think there is no doubt there was a marked aggravation of her heart condition, that the work she did since February, 1919, aggravated the condition and made her worse.

I have testified that I think her heart is worse now than it was in 1919, judging from the evidence here. And the work she did, in my opinion, aggravated and made it worse. All heart conditions are progressive, being progressively worse in this respect: That the pathology increases as the person grows older. The more care that that person takes of himself, the longer their expectancy. The longer a heart case—the better a heart case takes care of himself, the longer they

will live. That applies to all heart conditions. It is an infallible opinion among the doctors that rest in many instances—60 per cent or more—enters into the cure of any heart disease."

and again (R. 196):

"From the testimony here and the facts in this case that I have heard here, in my opinion the beginning stage or incipiency of her tuberculosis was following her acute infection in 1918 of Spanish influenza and bronchial pneumonia. I am bearing in mind the testimony of Dr. Wolfsohn. I know Dr. Wolfsohn personally very well.

Her heart condition was in the incipiency or beginning stage—it is my opinion that her valvular trouble began at the same time due to the infection of Spanish flu. I have an opinion as to whether or not her heart condition had progressed to the point where it was considered of a severe degree at the time of her discharge from the Army on February 3, 1919. My opinion is that it had progressed to a rather severe degree."

Dr. Welfield further testified (R. 197):

"There is no medicine to cure tuberculosis—the only chance is to give them good food and nourish the body, food and rest; sunshine and air.

Concerning His Honor asking me about Miss Hill sitting at a desk in a hospital or receiving ward, for instance, in a sedentary occupation, and concerning whether the mental worry and mental activity in connection with such an occupation have any tendency to increase the pulse rate, for instance, or aggravate either the heart or tubercular condition—mental work

uses up sometimes as much reserve force of the heart as physical work. On the other hand there are other kinds of mental work that do not do that at all. These Government reports show that these doctors did not find objective findings of tuberculosis. Their diagnosis we will say, at times was arrested tuberculosis. If, during that period and while trying to carry on an occupation of nurse nursing patients, Miss Hill had recurring colds, was coughing and felt tired and exhausted, and on several of the jobs, as she described on the stand here, she felt so tired she could not get out of bed in the morning—under those conditions she could not obtain arrestment of tuberculosis. In other words, if her tuberculosis had been arrested she would not show those symptoms.''

There is, of course, an abundance of other testimony on behalf of plaintiff, most of it lay evidence, but we think the foregoing a sufficient answer to the question:

"IS THERE ANY SUBSTANTIAL EVIDENCE OF APPELLEE'S TOTAL PERMANENT DISABILITY PRIOR TO HER DISCHARGE FROM THE ARMY?"

Having in mind the facts of the case we now turn to the law applicable thereto.

Analytically speaking,—and bearing in mind that no longer (since *United States v. Stephens,* supra, and *United States v. White,* supra) is it permissible to ask a doctor whether a person is totally and permanently disabled or whether he is able to follow continuously a gainful occupation—were we to ''break down'' the definition of total permanent disability, we find:

1. That a work record in and of itself is not conclusive, but merely evidence for the jury's consider-

ation; likewise vocational training (see particularly *U. S. v. Albano* (C.C.A. 9), 63 Fed.(2d) 677; *U. S. v. Nickel* (C.C.A. 8), 70 Fed.(2d) 873; *Law v. U. S.* (D. C. Mont.), 290 Fed. 972.

2. That if work is intermittent or spasmodic due to poor health, it is not "continuous" under the definition, and

3. If work aggravates the disease or physical condition and makes it worse or shortens life, it is not substantially gainful.

Since what work the appellee did was at the risk of her health and life, her work record does not bar her from recovery under her Insurance Contract.

In the leading case on what constitutes permanent total disability and the interpretation of the definition (Treasurer's Decision 20 W. R. dated March 9, 1918) the Supreme Court in *Lumbra v. United States,* 290 U. S. 551, 561; 54 S. Ct. 272, 78 L. Ed. 492 (at page 275, 54 S. Ct.) said:

> "The war risk contract unqualifiedly insures against 'total permanent disability.' The occasion, source, or cause of petitioner's illness is therefore immaterial. His injuries, exposure, and illness before the lapse of the policy and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally and permanently disabled during the life of the policy. March 9, 1918, in pursuance of the authorization contained in the War Risk Insurance Act, the director of the Bureau ruled (T. D. 20 W. R.): 'Any impairment of mind or body which renders it impossible for the disabled person to follow continu-

ously any substantially gainful occupation shall be deemed * * * to be total disability. Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.'

The phrase 'total permanent disability' is to be construed reasonably and having regard to the circumstances of each case. As the insurance authorized does not extend to total temporary or partial permanent disability, the tests appropriate for the determination of either need not be ascertained. The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules of formulae uniformly to govern its construction. That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others.''

And again, on page 276, the Supreme Court said:

''Total disability does not mean helplessness or complete disability, but it includes more than that which is partial. 'Permanent disability' means that which is continuing as opposed to what is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life.''

And further, on page 276, the Supreme Court said:

> "It may be assumed that occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability."

In *United States v. Flippence* (C.C.A. 10), 72 Fed.(2d) 611, at page 613, the Court said:

> "On the other hand, it is settled by high authority, that if one, unable to work in the sense that he is afflicted with a disease where rest is indicated nevertheless works 'when really unable and at the risk of endangering his health or life' such work does not bar recovery if the proof shows the insured to be otherwise entitled to recover. (Citing cases) If, during the life of his policy, an insured is afflicted with a disease which may be cured by a period of rest, but if, instead of following that course, he works until the disease reaches the incurable stage after his policy lapses, he cannot recover; not, however, because barred by his work record, but because at the time his policy lapsed his disease was curable and his disability temporary. *On the other hand, if, as here, the malady is incurable before lapse, and if it is of a nature where complete rest is necessary to prolong life, then work done thereafter endangers his life and does not necessarily bar recovery.*" (Italics ours.)

In *United States v. Brown* (C.C.A. 10), 72 Fed.(2d) 608, at page 610, the Court said:

> "Employment may be of such a nature and duration that it conclusively refutes any idea of total and permanent disability. On the other hand, a person who is incapacitated to work, impelled by necessity

and aided by a strong will, may engage in work that aggravates his condition and hastens his death. (Citing cases)

One who has a serious and incurable ailment for which rest is the recognized treatment and which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life.'' (Italics ours.)

In *United States v. Sorrow* (C.C.A. 5), 67 Fed.(2d) 372, the Court said:

"One is totally disabled when he is not, without injury to his health, able to make his living by work."

In the case of *United States v. William J. Higbee* (C.C.A. 10), 72 Fed.(2d) 773, the Court laid down the well recognized rule, which we submit is applicable to this case, as follows:

"He has worked since then but it apparently was done in a commendable effort to earn a living. Total and permanent disability does not require that one be an invalid or confined to his bed. He may work spasmodically with frequent interruptions, caused by his physical condition, and still be totally and permanently disabled. (Nicolay v. United States, 51 Fed. (2d) 170; United States v. Rye, 70 Fed.(2d) 150.) And work done under pressure of necessity, when health requires rest, does not necessarily disprove disability. The jury may well have found that insured was totally and permanently disabled; that his condition required rest and inactivity, but that the

> inescapable necessity to earn a livelihood for himself and his family spurred him to work with injury and aggravation of his physical condition. If so, he is not barred from recovering upon his contract. (Citing cases) Neither the fact that he received vocational training nor his long delay in instituting this action is conclusive against his right to recover. Both are circumstances for consideration of the jury under appropriate instructions of the court."

We believe that there can be no question but that there was substantial evidence that appellee worked when really unable and at the risk of endangering her health or life. See *Lumbra v. United States,* 290 U. S. 551, 54 S. Ct. 273, 78 L. Ed. 492.

The Supreme Court in deciding the *Lumbra* case, and in its opinion after making the statement quoted above cites several cases. The first case cited by the Supreme Court in the note is that of *United States v. Phillips,* in which the Court said:

> "Some persons, who are totally incapacitated for work, by virtue of strong will power may continue to work until they drop dead from exhaustion, while others with lesser will power will sit still and do nothing. Some who have placed upon them the burdens of caring for aged parents or indigent relatives, feeling deeply their responsibility and actuated by affection for those whom they desire to assist, will keep on working when they are totally unfit to do so. The mere fact that insured did work for Smith-McCord-Townsend Dry Goods Company and also for Montgomery Ward & Company does not necessarily prove that he could follow continuously a gainful occupation. The evidence shows that this work was

carried on under great difficulty and was a light class of work." See United States v. Phillips (C.C.A. 8), 44 Fed.(2d) 689.

The Supreme Court likewise cites, on page 499, of the *Lumbra* case, the case of *United States v. Godfrey.* In the *Godfrey* case, it appeared that the veteran was constantly on a payroll from October 14, 1919, until February 3, 1927, earning thirty to thirty-five dollars a week, and yet the verdict of the jury was accepted and the judgment affirmed, the Circuit Court for the First Circuit, saying:

> "The evidence is persuasive that Godfrey was a war victim. He was entitled to the most favorable view of the evidence. * * * To hold him remediless because he tried, manfully, to earn a living for his family and himself, instead of yielding to justifiable invalidism, would not, in our view, accord with the treatment Congress intended to bestow on our war victims."
>
> *United States v. Godfrey* (C.C.A. 1), 47 Fed.(2d). 126.

The next case cited in the footnote on page 499 of the *Lumbra* case is that of *Carter v. United States,* wherein Judge Parker stated the principle of law that we believe to be applicable in this case, which is:

> "To say that the man who works, and dies, is as a matter of law precluded from recovery under the policy, but that one who following the advice of his physician refrains from such work, and lives, is entitled to recovery, presents an untenable theory of law and fact, and emphasizes the necessity for a

determination upon the facts in each case whether the man * * * was able to continuously pursue a substantially gainful occupation."

Carter v. United States (C.C.A. 4), 49 Fed.(2d) 221.

The next case cited in the footnote to the *Lumbra* case, on page 499, is the case of *United States v. Lawson* decided by this Court (50 Fed.(2d) 646). In the *Lawson* case the veteran went to work on May 15, 1920, at a salary of $1100 per annum, plus a bonus of $240, and worked for this for one year, and then after doing some other work, on April 1, 1921, he was given a probatory appointment as forest ranger at a salary of $1220 per year, plus an annual bonus of $240, serving in this capacity until August 31, 1923. On September 1, 1923, he was appointed as a forest clerk at a basis salary of $1100 per year, in which capacity he served until April 15, 1924. The latter part of September, 1924, he became Postmaster at Spencer, Idaho, his annual pay being $1100, and he held that job at that salary continuously until the time of the trial in 1930, and this Court per Mr. Circuit Judge Sawtelle, said:

"It might be argued that the fact that plaintiff managed to hold several positions for the greater part of the time during the years in question, and actually engaged in work, proves that he was able to work and not totally and permanently disabled. But this does not necessarily follow. It is a matter of common knowledge that many men work in the stress of circumstances, when they should not work at all. When they do that they should not be penalized, rather should they be encouraged. A careful examination and consideration of the evidence herein con-

vinces us that the plaintiff worked when he was physically unable to do so, and that, but for the gratuitous assistance of friends and relatives who did much of his heavy work and the assistance of those whom plaintiff employed at his own expense, he would have been unable to retain his several positions. Under such circumstances, he should not be made to suffer for carrying on when others less disabled than he would have surrendered."

United States v. Lawson (C.C.A. 9), 50 Fed.(2d) 646, at 651.

We believe that the case at bar is a much stronger case than the *Lawson* case in favor of the veteran, for the reason that Lawson was still holding his position as postmaster at the time of the trial and at the time the appeal was decided.

In a case decided by this Court, that of *United States v. Burleyson,* 64 Fed.(2d) 868, it appeared that the veteran had worked continuously since service and was alive at the time of the trial, and this Court sustained the verdict, saying:

"On this diagnosis the experts disagree, nor is it entirely clear from their testimony that it was detrimental to the veteran's health to work as he did in the event that he was suffering from Buerger's disease. However, the weight of this evidence was for the jury. Their verdict is to the effect that for the veteran to work continuously would impair his health. In view of this situation, no matter how unsatisfactory the condition of the record, we must hold that there was substantial evidence to go to the jury upon the question of the total and permanent disability of

the veteran before the lapse of his war risk insurance policy."

United States v. Burleyson, 64 Fed.(2d) 868 at 872.

In a case which involved a heart disability it appeared that the veteran had earned $15,000. (*United States v. Francis* (C.C.A. 9), 64 Fed.(2d) 865.) The verdict of the jury in behalf of the veteran was sustained upon the theory that it was for the jury to determine whether the work that he had done had been injurious to his life or health.

In summarizing Francis' work record, this Court per Mr. Circuit Judge Wilbur, said:

> "It is claimed by the veteran that notwithstanding his long periods of work and substantial remuneration therefor, aggregating in all about $15,000., he was 'totally and permanently disabled' during that whole period. Within the meaning of that phrase as defined by the Treasury Department regulations and by the decisions of the courts. This view was sustained by the jury under proper instructions from the court and the question is whether or not the court erred in denying the motion of the Government for directed verdict.
>
> The testimony in favor of the veteran on the trial was directed to the proposition that although he did in fact work, and although he did so continuously for long periods of time, he was unable to do so because he thereby imperiled his health and shortened his life by reason of the excessive load put upon his heart, whose functions had been seriously impaired by the wound and resulting pus infection."

United States v. Francis, 64 Fed.(2d) 865.

OUR ANSWER TO APPELLANT'S CONTENTIONS.

As heretofore pointed out, we cannot agree that opposing counsel's statement of the facts is either fair or accurate. To us it sounds more like counsel's argument to the jury than a statement on appeal where counsel are bound by the findings of the jury on conflicting evidence.

APPELLEE'S "LONG" DELAY IN FILING CLAIM.

Appellee filed claim for insurance benefits on June 18, 1931, while a patient at the San Fernando (California) Veterans Hospital. In this respect she testified (R. 47):

> "I didn't pay premiums on my insurance after July of 1919, because I wasn't able to work to keep it up. I put in a claim for this insurance—filed the claim—on June 18, 1931, for insurance benefits. The first time that I heard I had any rights and had a right to assert a claim for this insurance was after I came to San Fernando. It was some time during the spring I would say, in May. I don't remember what day or what month it was, but I was admitted in the San Fernando hospital in April, and it was some time after I was admitted there that the Legion Commander called on me and he learned of my condition and he advised me about the insurance. I didn't know it. I didn't put in a claim prior to that time because I didn't know I could—that is the first time I knew I had a right to assert a claim."

This explanation evidently was satisfactory to the jury, whose duty, after all, it was to weigh the testimony.

See

Gilmore v. United States (C.C.A. 5), 93 Fed.(2d) 774;

United States v. Higbee (C.C.A. 10), 72 Fed.(2d) 773.

The cases cited by counsel in their brief, we submit, are not in point, on the question of total permanent disability, for as this Court has recently held, each war risk insurance case must stand on its own peculiar facts.

See

United States v. Thompson (C.C.A. 9), 92 Fed. (2d) 137, 139.

Furthermore, "All legitimate doubts as to whether appellee was totally permanently disabled must be resolved in appellee's favor."

See:

United States v. Sligh (C.C.A. 9), 31 Fed.(2d) 737;

United States v. Balance (D. C. App.), 59 Fed.(2d) 1040;

McNally v. United States (C.C.A. 4), 52 Fed.(2d) 440;

Putney v. United States (D. C. Colo.), 4 Fed. Supp. 376.

APPELLEE'S GALL BLADDER OPERATION IN 1927.

Counsel on page 18 of their brief attempt to make much of the fact that appellee had a gall bladder operation in 1927 and took ether as a general anesthetic.

This was not inconsistent with her claim of total permanent disability and did not prove that she did not have a serious heart and pulmonary condition at that time. Counsel for the Government cross-examined two doctors on this point; namely, Dr. Cohn (R. 167-168) and Dr. Welfield (R. 199-200), both of whom testified that ether is a heart stimulant and not a heart depressant, also that ether would not hurt appellee's tubercular lungs. Both doctors testified that general anesthetics are oftentimes given patients suffering from either active tuberculosis or serious heart disease or both (R. 167-168; R. 199-200). That in that kind of an operation, blood pressure and kidney conditions are more important.

In the record (R. 268-271) counsel have photostated facsimiles of appellee's application for Civil Service examination. They also set forth various other documents signed by appellee which probably were intended to impeach her testimony.

These matters merely went to the weight of her testimony.

See:

La Marche v. United States (C.C.A. 9), 28 Fed. (2d) 828;

United States v. Albano (C.C.A. 9), 63 Fed.(2d) 677.

In the *La Marche* case this Court held (Par. 4, Syl.):

> "In action on war risk insurance policy, plaintiff's false claim of injury after expiration of policy for purpose of having his employer pay his hospital bills and expenses, and his certificate some time after ex-

piration of policy that his condition was same then as when policy lapsed, were immaterial, except so far as they might affect his credibility as a witness."

CONCLUSION.

We realize this brief is somewhat protracted, but we felt the matter is of such importance to the appellee that it was incumbent upon us to urge every important point in her favor on this appeal.

Then again, in order to do justice to her cause and to answer the inquiry, "Is there *any* substantial evidence in the record to justify the jury's verdict?" we felt it necessary to point out in the record that evidence—tested in the light of the leading cases on the subject—which in our humble opinion fully meet the legal requirements concerning what evidence is necessary to constitute total permanent disability.

Counsel for appellant attempts to lay great stress on the Government's medical records which somewhat minimize appellee's disabilities. But from an appellate standpoint, the most that can be claimed for the Government's evidence is that it conflicts with appellee's evidence. The jury having resolved that conflict in appellee's favor, leaves nothing before an appellate court.

See

United States v. Burleyson (C.C.A. 9), 64 Fed.(2d) 868, and other cases cited above.

It must be borne in mind that all of the Government's Veterans Administration reports were introduced by the Government—not by appellee.

From a medical standpoint, however, the medical evidence is readily reconcilable. Take appellee's heart condition, for instance. Dr. J. J. Klein, a Government doctor employed at the Veterans Hospital at San Fernando, was appellee's ward doctor a large part of the seven months she was hospitalized there. He gave her the entrance examination and at first found no heart disease (R. 246), although he admitted he later found it. In fact, her heart was so bad he didn't dare give her any exercise. In this respect he testified (R. 246):

> "The graduated exercise, as a rule, continues until we are satisfied in regard to making the diagnosis. In this case we had to give that up more on account of her heart than anything else."

Concerning a tuberculosis expert not finding a serious heart disease, Dr. Klein testified (R. 248):

> "I gave them a general physical examination but I didn't happen to catch anything on the heart at that time. I am presuming that it was there from the subsequent results. I dare say it is possible that a person can have a heart murmur and a chest man, a specialist on tuberculosis, looking only for tuberculosis, can very easily pass up that murmur."

We think this completely explains just how it was possible for the Government doctors who examined appellee for the Government to "slip up" and miss finding the heart condition, although it was there all the time. It

is a matter of common knowledge that some doctors are very careful in their examination while others are not. The jury apparently accepted and had a right to accept this explanation.

Regarding her tuberculosis Dr. Klein testified (R. 247):

> "Generally the Veterans Hospital at San Fernando follows the classification of tuberculosis laid down by the National Tuberculosis Association, and one of the rules of the National Tuberculosis Association is that where one remains quiescent or inactive for a period of six months a change of diagnosis to arrested tuberculosis is justified.
>
> Although I observed her over six months I only gave her exercise for two or three days except the exercise she would get in going out on passes and leaves. I did not examine her immediately after she left when she went out on passes and leaves; I didn't think it was necessary. It is true that the rule of the National Tuberculosis League provides that before a diagnosis of arrested tuberculosis is justified, in addition to observing the patient for six months, the last two months of this six months the patient must have been given an hour's walking exercise twice daily, or its equivalent, and then if the patient shows no symptoms of tuberculosis, then and then only are you justified in making a diagnosis of arrested tuberculosis."

Dr. Klein further testified (R. 248):

> "I recall telling Miss Hill when she complained to me of feeling tired that she would probably be tired for the rest of her life."

The diagnostic standards of the National Tuberculosis Association, to which Dr. Klein referred, provide, under the "Schema for the Classification of Subsequent Observations" (page 29, Diagnostic Standards, Tenth Edition, 1935) as follows:

> "II. Arrested
>
> All constitutional symptoms absent; sputum, if any, microscopically negative for tubercle bacilli; X-ray findings compatible with a stationary or retrogressive lesion. These conditions shall have existed for a period of six months, during the last two of which the patient has been taking one hour's walking exercise twice daily or its equivalent."

In none of the Veterans Bureau examinations—not even San Fernando Hospital—did any of these Government doctors give her a six months' observation with two months' walking exercise.

Therefore, we submit this is a clear explanation of just how and why these various Government doctors were unable to find tuberculosis when they examined her—the answer, they didn't make the test—and said her tuberculosis was arrested when, in fact, they hadn't made the recognized and requisite test to determine if her tuberculosis was, in fact, arrested. Therefore, the unreliability of their examinations has been demonstrated. We believe it elementary that the jury had a right to accept this explanation, especially when these Government doctors' reports conflicted with the positive medical evidence of the doctors produced by appellee.

We think it significant that on the only job which can really be called employment, namely, for the Government

in its Indian Service, appellee soon broke down again and such employment was terminated (R. 123) on account of her physical condition.

In conclusion we submit there is ample evidence in the record to justify the jury's verdict and that the judgment of the lower court should be affirmed.

July 11th, 1938.

Respectfully submitted,

ALVIN GERLACK,

Attorney for Appellee.

No. 8835

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, a corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8835

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, a corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index Page

Index

Index

NAMES AND ADDRESSES OF COUNSEL.

MESSRS. DAVIS AND GROFF,
1333 Dexter Horton Building,
Seattle, Washington,
Attorneys for Appellant.

MR. RAY R. GREENWOOD,
Bremerton, Washington,
Attorney for Appellees.

MR. H. SYLVESTER GARVIN,
955 Dexter Horton Building,
Seattle, Washington,
Attorney for Appellees. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington for Kitsap County.

No. 12724.
No. 21098 (Dist. Court).

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND, a corporation engaged in the business of writing fire insurance in the State of Washington, and F. E. LANGER,

Defendants.

COMPLAINT.

Come now the plaintiffs and for a cause of action allege:

I.

That the plaintiffs, William E. Bilquist, John Myrhe and Signe Myhre, as a community were at all times hereinafter mentioned joint owners of certain real estate situated in the County of Kitsap, State of Washington, being described particularly as

> Lots 1 and 2, Block 4, also lots 8 and 9, Block 5, Davis Addition to Manchester, Washington.

That heretofore and on the 10th day of August, 1935, there was situated upon said property a cer-

tain building known as the Manchester Inn, used as a place of residence for these plaintiffs as well as an inn and tavern.

II.

That the Fidelity and Guaranty Fire Corporation of Baltimore is a corporation, organized and existing under the laws of the State of Maryland, with a license to transact business in the State of Washington and to write policies of fire insurance under and pursuant to the laws of said state. That the defendant F. E. Langer is President and Manager of the Kitsap County Bank, a banking corporation at Port Orchard, Kitsap County, Washington, and in connection with said business and in addition thereto is and at all times hereinafter mentioned the general agent at Port Orchard of the said Fidelity and Guaranty Fire Corporation of Baltimore.

III.

That heretofore, to-wit: on the 10th day of August, 1935, the said Kitsap County Bank having taken a mortgage upon the property of the plaintiffs, above named, and the said F. E. Langer, assuming for the protection of his own Bank and for the protection of these parties to place upon said property certain fire protection and insurance; upon his own motion and at his own instance with the [2] consent and approval of these plaintiffs caused to be written and delivered to his own Bank, as incumbrancer, a certain policy of fire insurance,

being Policy No. 28222, wherein and whereby the said Fidelity and Guaranty Fire Corporation of Baltimore did insure said real estate in the sum of twenty-five hundred dollars ($2500.00); and the furniture, personal property, and equipment situated therein, also the property of these plaintiffs, in the full sum of fifteen hundred dollars ($1500.00). That said policy was written with insurance running to William E. Bilquist, plaintiff herein assured, with insurance payable to the Kitsap County Bank as its interest may appear; and this fact having been made known to the defendant John Myhre and objection made by him to the insurance not being made to Bilquist and himself, jointly, the said F. E. Langer thereupon placed upon said policy a certain clause providing that said insurance should be made payable to John Myhre and Signe Myhre, as incumbrancers, as their interest appeared, and advised the said John Myhre and Signe Myhre, that he had corrected the policy in such manner as to protect them fully to the amount of their interest, and thereafter drew upon their account in the Kitsap County Bank at Port Orchard, Washington, for the full premium of said policy, to-wit the sum of seventy-seven dollars ($77.00).

IV.

That thereafter and on the 12th day of September, 1936, a fire occurred upon the said premises, totally destroying the building hereinabove referred to, as well as all personal property situated therein;

which personal property was of the fair market value of one thousand eight hundred seventy-one dollars ($1871.00) an itemized list of which is hereto attached and marked "Exhibit A" and by such reference made a part hereof; and upon the occurrence of said fire, the said F. E. Langer immediately assumed the duty of procuring an adjuster, notifying the company, and protecting the interest of those assured relative to said fire. That thereafter on the 3rd day of December, 1936, a duly sworn proof of loss was made by these plaintiffs themselves and forwarded to the defendant insurance company, claiming a total loss upon said property and furniture of four thousand dollars ($4000.00), the amount of said policy. That these plaintiffs did not know or discover the necessity of a proof of loss until after the expiration of sixty (60) days from the date of fire, the policy being at all times in possession of the said F. E. Langer, agent of the defendant corporation, and he having dealt directly with one Allen V. Kelly, a licensed adjuster of the State of Washington relative to said loss; and that the said insurance company, their agent, and said adjuster led these plaintiffs to believe that the entire matter was being handled and lulled them into security in their failure to employ counsel, seek advice, or protect their own rights.

V.

That thereafter on the 17th day of December, 1936, the defendant insurance company, above

named, rejected liability upon said policy in any amount whatsoever and tendered to these plaintiffs the sum of seventy-seven dollars ($77.00), the premium alleged to have been paid thereon. [3]

VI.

That although no specific grounds of rejection were set forth in the notice of Allen V. Kelly, aforesaid, a copy of which is hereto attached and marked "Exhibit B", these plaintiffs alleged that said policy is claimed to be defective, particularly in that the premises were operated as a tavern and inn rather than as an unprotected dwelling for which it was insured, and that therefore the rate paid, or to-wit the sum of seventy-seven dollars ($77.00) premium was inadequate; also that John Myhre and Signe Myhre are shown upon said policy to be incumbrancers, where in truth and in fact they were one-half owners, but relative to said matters these plaintiffs allege that all these facts and the true situation relative to said property, the use thereof, and the relation thereof were known to the defendant Langer, who is acting for and representing the defendant insurance company as general agent. That no statements or representations of any kind, nature, or description were made by these plaintiffs, or any of them, relative thereto. That said policy was never delivered to these plaintiffs, but was retained by said F. E. Langer for the Kitsap County Bank as incumbrancer, and that said policy was never placed in the possession of

these plaintiffs at all, but that each and every act pertaining to the insuring of said property was assumed to be done and was done by the said F. E. Langer on his own initiative and based upon his own knowledge relative to the property, its use, and ownership.

Wherefore, these plaintiffs pray: judgment as follows: against the defendants and all of them in the full sum of four thousand dollars ($4000.00) together with their costs and disbursements herein to be taxed.

RAY R. GREENWOOD
Attorney for Plaintiffs.

State of Washington,
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: that he, as an individual, is one of the plaintiffs named in the above entitled action; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

JOHN MYHRE

Subscribed and Sworn to before me this 29th day of December, 1936.

RAY R. GREENWOOD
Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Jan. 6, 1937. [4]

EXHIBIT "A"

Upstairs—Bedrooms

11 rugs—each room	$ 85.00	
10 beds—springs and mattresses	210.00	
11 dressers at $15	165.00	
10 wash stands	30.00	
10 wash bowls and pitchers at $1.00	10.00	
20 chairs at $1.50	30.00	
20 quilts	20.00	
40 sheets & pillow slips	60.00	
20 pillows at $2.00	40.00	
Hall carpet on stairs	5.00	
Blinds and curtains	15.00	
		655.00

Bathroom—Upstairs

1 dresser	5.00	
1 bowl and pitcher	1.00	6.00

Lobby

1 settee—chair and rocker	35.00	
1 rocker	7.00	
1 straight chair	4.00	
1 library table (hardwood)	10.00	
1 radio	15.00	
(1 rug included in upstairs)		
2 sets curtain and blinds	8.00	
		79.00

Dining Room		
6 sets dining tables with 4 chairs @ $9	54.00	
2 sets tables—6 chairs @ $11	22.00	
1 piano	150.00	
1 circulating wood heater	35.00	
10 sets curtains and blinds @ $3	30.00	
8 table cloths @ $1.50	12.00	295.00
Bar		
1 counter and 1 back bar	35.00	
Taps, taprods, hose, air drums, coil box	45.00	
1 small Norge	50.00	
Misc. glasses and curtains	25.00	
6 stools @ $1	6.00	
		161.00
Ladies' Rest Room		
1 dresser	20.00	20.00
Kitchen		
2 plate range	25.00	
1 oven electric range	60.00	
1 dish-up table	10.00	
1 dish rack	15.00	
1 Frigidaire (large)	250.00	
2 side boards (hardwood)	70.00	
dishes & silverware (service for 40 people)	100.00	
Miscellaneous utensils	25.00	
Electric Water Pump	100.00	655.00
Final Total		$1904.00

[5]

EXHIBIT B

ALLAN V. KELLY
Fire Insurance Adjuster
Empire Building
Seattle, Washington

December 17, 1936.

Mr. Ray R. Greenwood,
Attorney at law,
Bremerton, Washington.

Re: Claim—Policy No. 28222:

Dear Sir:

A paper signed by John Myhre purporting to be a Proof of Loss has been received by us and we hereby give you notice that same is rejected and liability denied.

We hereby tender $77.00, the premium paid for said policy, and $6.25 which is 6% interest from August 10th, 1935 to December 15th, 1936.

Very truly yours,
FIDELITY & GUARANTY
FIRE CORPORATION,
By ALLAN V. KELLY (signed)
Adjuster.

AVK:LO

I hereby reject the sum of $77.00 and the interest mentioned above.

RAY R. GREENWOOD (signed) [6]

[Endorsed]: Filed Feb. 18, 1937.

[7]

[Title of Superior Court and Cause.]

NOTICE.

To: Mr. Ray R. Greenwood, 201 Bremerton Trust & Savings Bank, Bremerton, Washington, Attorney for the Plaintiffs.

Notice is hereby given that the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, in the above entitled cause, will, on the 8th day of February, A. D. 1937, at the hour of 10:30 A. M. of said day file in the Superior Court of the State of Washington in and for Kitsap County, sitting in and for the County of Kitsap, in said State in which said suit is now pending, its Petition and Bond for the Removal of said cause from said State Court to the District Court of the United States in and for the Western District of the State of Washington, and the Northern Division thereof.

DAVIS AND GROFF
Attorneys for Defendant:
FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND.

Office and P. O. Address: 1333 Dexter Horton Bldg., Seattle, Washington.

Copy Received together with copies of Petition and Bond this 6th day of Feb., 1937.

RAY R. GREENWOOD
Atty. for Plf.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy. [8]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

To: The Honorable Judge of the Superior Court of the State of Washington, in and for Kitsap County:

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and files this, its Petition for Removal of this case from the aforesaid Superior Court of the State of Washington in and for Kitsap County, in which it is now pending, to the District Court of the United States in and for the Western District of Washington, Northern Division thereof, held in the City of Seattle, in said District and State.

And for ground of such removal your petitioner would show unto your Honor:

1. That service of Summons and Complaint in this action was made upon the Hon. William A. Sullivan, Insurance Commissioner for the State of Washington, on the 11th day of January, A. D. 1937, and that under the laws in force in the State of Washington this defendant has forty (40) days from the date of such service in which to plead, answer or demur to the plaintiffs' Complaint, and that the time for this defendant to plead, answer or demur to the same has not expired under the laws of this State [9] in such case made and provided.

2. That the suit is one of a civil nature at common law of which the district courts of the United States have original jurisdiction in that the suit is one to recover the sum of Four Thousand ($4,00.00) Dollars, together with interest and costs, upon a certain policy of fire insurance issued by the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, to William E. Bilquist, one of the plaintiffs herein, in which said policy of fire insurance, and in the recovery thereof, the said plaintiffs, John Myhre and Signe Myhre, claim an interest.

3. That the matter in dispute exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

4. That at the time of the commencement of this suit and ever since, the plaintiffs, and each and all of them, were and still are citizens and

residents of the State of Washington and of the county of Kitsap in said State.

And the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, asking this removal, was, at the time of the commencement of this suit and ever since has been, and now is, a corporation duly organized and existing under the laws of the State of Maryland having its principal office and place of business in the city of Baltimore, in said state of Maryland, and at all said times was and still is a citizen of the State of Maryland.

That the defendant, F. E. Langer, is a resident of the County of Kitsap, aforesaid, and a citizen of the State of Washington.

That there exists and is set forth in the Complaint of the plaintiffs in the above entitled action a separate and separable controversy between the plaintiffs and the defendant, F. E. Langer, from that existing and set forth in said Complaint [10] between the plaintiffs and this defendant, your petitioner. That the controversy arising in this suit between the plaintiffs and this defendant, your petitioner, aises solely out of the alleged right of the plaintiffs to recover of the defendant, your petitioner, upon a written policy of fire insurance issued by this defendant to the plaintiff, William E. Bilquist, in which the other named plaintiffs claim some interest in the policy and in the recovery sought in this suit.

That the defendant, F. E. Langer, is not a party, either as insured or insurer, to said policy of insurance, and is not liable thereon, and that the con-

troversy existing between the plaintiffs and the defendant, F. E. Langer, set forth and alleged in said suit or action, arises solely out of the alleged negligence and want of due care on the part of the said F. E. Langer in acting as agent of the said plaintiffs and as the agent of the Kitsap County Bank, a banking corporation.

That the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, your petitioner, is liable, if liable at all, only upon its contract of insurance evidenced by its written policy thereof, and that the defendant, F. E. Langer, is not liable to the plaintiffs upon such contract of fire insurance, and that, therefore, there exists as to the defendant, your petitioner, a separate and separable controversy between it and the plaintiffs from that existing between the defendant, F. E. Langer, and the plaintiffs.

That as between the plaintiffs and this defendant the controversy existing in this cause of action can be wholly determined between them both as to the issues of law and fact without affecting the interests of the defendant, F. E. Langer, or without affecting the right of the plaintiffs to recover against the defendant, F. E. Langer, upon the controversy existing between them. [11]

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs, and he will, within thirty (30) days from the filing of the Petition for Removal, file a certified copy of the record of the case in the District Court of the United

States for the Western District of Washington, Northern Division, and for the payment of all costs which may be awarded by said Court, if said District Court shall determine that this suit was improperly and wrongfully removed thereto.

Your petitioner therefore prays to the Court that it proceed no further herein except to order the removal, accept the bond herewith presented, and direct a transcript of the record to be made and certified as provided by law.

DAVIS AND GROFF
Attorneys for Petitioner.

State of Washington,
County of King—ss.

I, Guy B. Groff, being first duly sworn on oath, depose and say: That I am a citizen of the United States of America, a resident of King County in the State of Washington, and a citizen of the State of Washington, of full and lawful age. That I am one of the attorneys for the petitioner, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, for the removal of the above entitled cause to the District Court of the United States, as prayed for in its said Petition.

That the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, is a corporation organized and existing under the laws of the State of Maryland, having its principal office and place of business in the State of Maryland; and that said corporation is absent from the State of Wash-

ington and has [12] no officer thereof within the State of Washington authorized to make this verification; and that I make this verification for and in its behalf for the reason aforesaid.

That I have read the foregoing Petition; that the allegations of said Petition are true of my own knowledge except that stated on information and belief, and to that extent I believe them to be true.

GUY B. GROFF

Subscribed and Sworn to before me this 5th day of February, 1937.

[Seal] MERVYN F. BELL

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in U. S. District Court, Feb. 18, 1937.

[13]

[Title of Superior Court and Cause.]

BOND ON REMOVAL TO THE DISTRICT COURT.

Know All Men By These Presents: That we, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, as principal, and United States Fidelity & Guaranty Co. of Baltimore, Maryland, a surety company organized and existing under the laws of the State of Maryland, and authorized to transact a surety business within the State of Washington, as surety, are held and firmly bound unto the plaintiffs in the above en-

titled cause, William E. Bilquist, John Myhre and Signe Myhre, in the sum of Five Hundred ($500.00) Dollars lawful money of the United States of America for the payment of which, well and truly to be made, we, and each of us, bind ourselves and each of our successors, representatives and assigns, jointly and severally by these presents.

The conditions of this obligation are such that whereas the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, principal herein, has applied by petition to the Superior Court of the State of Washington for Kitsap County for the removal of a certain cause wherein William E. Bilquist, John Myhre and Signe Myhre are plaintiffs, and Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington, being organized and existing under and by virtue of the laws of the State of Maryland, and a citizen and resident of said state, is a defendant, and F. E. Langer, a citizen of the State of Washington, is also a defendant, to the District Court of the United States for the Western District of Washington, Northern Division, for [14] further proceedings on the grounds in said Petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

Now, Therefore, if your petitioner, the said Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, shall enter in said District

Court of the United States for the Western District of Washington, Northern Division aforesaid within thirty (30) days from the date of the filing of said petition a certified copy of the record of such suit, and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States, and if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

Dated February 5th, 1937.

FIDELITY AND GUARANTY FIRE CORPORATION OF BALTIMORE, MARYLAND, a corporation,

By: DAVIS and GROFF
Its Attorneys.

[Corporate Seal] UNITED STATES FIDELITY & GUARANTY CO.

By JOHN C. McCOLLISTER
Attorney-in-fact.

Bond approved.

JAMES T. LAWLER
Judge.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy.

[15]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL.

This cause coming on for hearing upon the petition of the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, a corporation, for an order removing this cause to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing to this Court that the said defendant has filed its petition for such removal in due form and within the required time and that said defendant has filed its bond duly conditioned as provided by law, and it being shown to the Court that the notice required by law of the filing of said bond and petition had, prior to the filing thereof, been served upon the plaintiffs herein, which notice the Court finds is sufficient and in accordance with the requirements of the statute, and it appearing to the Court that this is a proper cause for removal to said District Court of the United States,

Now, Therefore, the said petition and bond are hereby accepted, and it is hereby ordered that this cause be and it is hereby removed to the District Court of the United States for the Western District of Washington, Northern Division, and that all other proceedings be stayed, and the Clerk is hereby directed to make up [16] the record in said cause for transmission to said court forthwith.

Done in Open Court this 8th day of February, 1937.

JAMES T. LAWLER
Judge.

Presented by:

GUY B. GROFF
of DAVIS and GROFF, 1333 Dexter Horton Bldg., Seattle, Wash.
Attorneys for defendant: Fidelity and Guaranty Fire Corporation of Baltimore, Maryland.

[Endorsed]: Filed Feb. 8, 1937. Reina M. Osburn, Clerk. By Arthur Lund, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 18, 1937. Edgar M. Lakin, Clerk, By S. Cook, Deputy.

[17]

In the District Court of the United States for the Western District of Washington.

No. 21098

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington, and F. E. LANGER,

Defendants.

ANSWER OF FIDELITY AND GUARANTY FIRE CORPORATION.

Comes now the defendant Fidelity and Guaranty Fire Corporation by Davis and Groff, its attorneys, and appearing and answering for itself, and not for or in behalf of any other defendant, and answering the complaint of the plaintiffs in the above entitled action says:

I.

The defendant denies that the plaintiffs William E. Bilquist, John Myhre and Signe Myhre, were a community and as such were the joint owners of the real estate in Kitsap County described in paragraph numbered I in plaintiffs' complaint.

Further answering thereto, this defendant says that on the 10th day of August, 1935, one Bessie Bilquist was and still is the lawful wife of the plaintiff William Bilquist and that the said William Bilquist and Bessie Bilquist, on the day and year last aforesaid constituted and still constitute a marital community, and such interest as the plaintiff William Bilquist then had therein was not his sole and separate property but was the property of such community.

That this defendant further admits that on the 10th day of August, A. D. 1935, there was situated on the said described property a building sometimes known as Manchester Inn, and used as an Inn; [18] and further this defendant denies each and every allegation of paragraph numbered I of said complaint not hereinabove expressly admitted.

II.

This defendant admits that it is a corporation organized and existing under the laws of the State of Maryland with license to transact business and write policies of fire insurance under and pursuant to the laws of this state, but it avers that its true and correct name is Fidelity and Guaranty Fire Corporation.

This defendant admits that the defendant F. E. Langer at all times mentioned in the plaintiffs' complaint was, and still is, the president of the Kitsap County Bank, a banking corporation at Port Orchard, Kitsap County, Washington.

This defendant admits that on the 10th day of August, A. D. 1935, the defendant F. E. Langer was, and for some time theretofore had been, a soliciting agent for this defendant at Port Orchard aforesaid, for the purpose of and having authority to solicit, secure and submit to this defendant applications for policies of fire insurance.

This defendant denies that the said F. E. Langer, was at any of the times in the plaintiffs' complaint mentioned a general agent of or for this defendant, and this defendant denies each and every allegation of fact in said paragraph numbered II of the plaintiffs' complaint contained and not hereinabove by this defendant in this paragraph expressly admitted.

III.

This defendant admits that on or about the 10th day of August, A. D. 1935, the defendant F. E. Langer for the protection of the Kitsap County Bank of which he was then president, on his own motion and at his own instance made and forwarded to this defendant application for insurance on the property described in the [19] plaintiffs' complaint in the name of William Bilquist as a dwelling house with loss if any payable to the Kitsap County Bank as its interest might appear; that acting upon such application this defendant did issue and forward to the said F. E. Langer its policy of insurance, numbered 28222, wherein among other things it was recited and set forth that this defendant did insure William Bilquist as the owner of the build-

ing situated on said premises against loss by fire in the sum of two thousand five hundred dollars while occupied only for dwelling house purposes, and did insure the said William Bilquist against loss by fire of the household furnishings and personal effects only while contained in the said building and while said building was used only for dwelling house purposes, and that said policy was by the said Langer delivered to the Kitsap County Bank.

This defendant admits that it was recited in said policy that in case of loss the insurance upon the building only, and not upon the household furnishings and personal effects, should be payable first to the Kitsap County Bank, first mortgagee, secondly to Clarence Jones, second mortgagee, and thirdly to John and Signe Myhre, third mortgagees, as their several interests might appear.

As to the other matters and things in the said paragraph numbered III of the plaintiffs' complaint not hereinabove in this paragraph expressly admitted, this defendant denies the same and each, every and all thereof.

IV.

This defendant admits that on the 12th day of September, A. D. 1936, the building on said premises and some of the personal property therein situated were destroyed by fire and that on the 3d day of December, A. D. 1936, an instrument purporting to be a proof of loss and to have been executed by the plaintiffs, claiming a total loss on said property

and furniture of $4,000.00, was [20] forwarded to this defendant.

This defendant denies each and every allegation and alleged fact set forth in paragraph numbered IV of the plaintiffs' complaint not hereinbefore in this paragraph expressly admitted.

V.

This defendant admits the allegations of paragraph numbered V of the plaintiffs' complaint.

VI.

This defendant admits that it rejected such proof of loss in part because said policy was void because it was, and was operated as, an inn or tavern and place for the sale of beer and other intoxicating liquors, and was not used solely for a dwelling, and in part because the interest of the insured in the property was not truly stated in the policy, and that the interest of the insured was other than unconditional ownership, and in part because the hazard, within the meaning of the policy, had subsequent to the issuing of said policy been increased by means which were within the knowledge and control of the insured, and in part because such proof of loss was not rendered to this defendant within 60 days next after such loss occurred.

That each and every allegation of, or contained in, said paragraph numbered VI of the plaintiffs' complaint not hereinabove in this paragraph expressly admitted is denied.

And by way of further answer and as a first affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That at all times hereinafter mentioned the plaintiffs William E. Bilquist and Bessie Bilquist were and still are husband and wife, and constituted and still constitute a marital community [21] under the laws of the State of Washington.

That at all times mentioned the plaintiffs John Myhre and Signe Myhre were and still are husband and wife and constituted and still constitute a marital community under the laws of Washington.

II.

That at all times hereinafter mentioned the real estate and premises, with the buildings and improvements thereon, including the building described in and assumed to be covered by the policy of insurance set forth in the plaintiffs' complaint, and being known and described as lots 1 and 2 of block 4, and lots 8 and 9 in block 5, of Davis Addition to Manchester, Washington, was the property of and owned by the marital communities of William Bilquist and wife, and John Myhre and wife, as tenants in common.

That the policy of fire insurance issued by this defendant in the name of the plaintiff William Bilquist on the 10th day of August, A. D. 1935, and referred to and described in the plaintiffs' com-

plaint, covered a two-story, shingle roof, frame building while occupied only for dwelling house purposes, and certain household and personal effects only while contained in the above described dwelling house building, and said policy of fire insurance purported to insure, and this defendant agreed to insure the plaintiff William Bilquist against loss by fire of the aforesaid two-story frame building, in the sum of and to the extent of twenty-five hundred dollars, only while said building was occupied and used only and solely for dwelling house purposes, and not otherwise, and said policy of insurance purported to insure, and this defendant thereby agreed to insure, the household furnishings and personal effects of the said William Bilquist against loss by fire in the sum of and to the extent of fifteen hundred dollars, only while said furniture and household effects were contained in the above [22] described two-story building, and only while and so long as the said above named two-story frame building was occupied and used only and solely for dwelling house purposes, and not otherwise.

III.

That this defendant, at the time of issuing said policy of fire insurance did not have, nor did it have at any time prior to the 13th day of September, A. D. 1936, nor prior to the time of the destruction of said building by fire as alleged in paragraph numbered IV of plaintiffs' complaint, any knowledge, notice or information of, and did not know, of the

fact that said building was not occupied only for dwelling house purposes.

IV.

That the defendant F. E. Langer on the 10th day of August, A. D. 1935, resided at Port Orchard in said county, and for some time theretofore had acted as a soliciting agent for this defendant, at Port Orchard, for the purpose of and having authority to solicit and obtain and submit to this defendant applications for policies of fire insurance.

V.

That on the 10th day of August, A. D. 1935, the said two-story, shingle-roof, frame building mentioned in the policy of insurance hereinbefore described, and attempted to be covered and insured by said policy of insurance against loss by fire only while and so long as occupied only and solely for dwelling house purposes, was, and for a long time theretofore had been, and until its destruction by fire on the 12th day of September, A. D. 1936, as hereinbefore set forth, continued to be occupied and used for business purposes and in particular as a hotel, inn or lodging house, and as a place where meals and lodgings were furnished and sold to the public generally for compensation. That no permit was ever issued by this defendant for the occupation and use of said premises for business [23] purposes, nor otherwise than solely as a dwelling and for dwelling house purposes only, and this defendant did not consent thereto.

VI.

That the defendant F. E. Langer was at all times herein mentioned, and still is, president and managing officer of the Kitsap County Bank, a banking corporation existing under the laws of the State of Washington, and located at Port Orchard, aforesaid, and at all times owning and controlling a majority of the shares of the capital stock of such banking corporation, and being at all times in control of said bank.

VII.

That the plaintiffs acquired the title to the insured property from one Joseph Hass of Port Orchard on or about the 25th day of July, A. D. 1935, and that the arrangement or deal for the purchase of such property was consummated through and by the aid and assistance of the defendant F. E. Langer and through and by the aid and assistance of the said Kitsap County Bank, and the said Kitsap County Bank, with the knowledge and approval of the defendant F. E. Langer, advanced to the plaintiffs, for the purpose of consummating the purchase of such property, a large sum of money, to-wit, the sum of twenty-one hundred dollars, and that on the 10th day of August, A. D. 1935, the plaintiffs were indebted to the said Kitsap County Bank in a large sum of money, to-wit, the sum of twenty-one hundred dollars, loaned and advanced to the plaintiffs for the purpose of securing the title to said property, and which was secured, in whole or in part, by a mortgage on said premises.

VIII.

That at the time said property was acquired by the plaintiffs the insurance thereon consisted of and was limited to the sum of one thousand dollars upon the building on said property and the sum of one thousand dollars upon the household furnishings and [24] personal property therein.

That the defendant F. E. Langer at all times well knew that the building situated on the premises hereinbefore described was not occupied or used for dwelling house purposes only, and well knew that such building was old and of little value and that it had been built in or about the year 1908, and well knew the amount of the insurance then upon said property, and well knew that the entire premises, including said household furnishings and personal effects and including said building and including the real estate whereon the same had been situated, had been acquired by the plaintiffs in the month of July, 1935 for the purchase price or sum of three thousand five hundred dollars, and the said F. E. Langer then, to-wit, on August 10, 1935, and at all other times herein mentioned, well knowing that said building was fairly and reasonably worth not to exceed the sum of one thousand dollars, and well knowing that the plaintiffs were using and occupying the building on said premises for business purposes and as a hotel, inn or lodging house, and as a place where meals and lodgings were offered and sold to the public, and not for dwelling house purposes only, and well knowing that said

household furnishings and personal effects were fairly worth not to exceed the sum of one thousand dollars, and well knowing that the same were not kept or contained in any building used solely and only for dwelling house purposes, and well knowing that said described property was an unsafe and undesirable risk for fire insurance, and well knowing that this defendant would not insure the said property against loss by fire if it were known to this defendant that said property was used for other than dwelling house purposes solely, and for the purpose of obtaining insurance thereon to protect the said Kitsap County Bank against any loss in the event of the destruction of such property by fire, caused the cancellation of the insurance then [25] existing, made application to this defendant for the issuance of a policy of fire insurance upon said building as a building used for dwelling house purposes only in the sum of twenty-five hundred dollars, and upon the household furnishings and personal effects contained in the building used for dwelling house purposes only in the sum of fifteen hundred dollars, with the loss upon the building, if any, payable to the said Kitsap County Bank as first mortgagee, as its interest might appear, and the balance, respectively, to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interests might appear. That in all matters and things connected with the making of such application and in the issuance of said policy, and in connection with, or relating

thereto, the defendant F. E. Langer, while pretending to act as the soliciting agent of this defendant, in truth and fact acted for and in his own interest and for and in behalf of the interests of the said Kitsap County Bank, and in his own interest and in the interest of the Kitsap County Bank misrepresented, falsely stated and fraudulently concealed from this defendant the true facts as to the ownership and the use and occupancy of said insured premises as aforesaid. That thereupon this defendant, not knowing that the said property was used as a hotel or inn or as a place for the furnishing and sale of meals and lodgings to the public, and not knowing the value of such property, and not knowing of the interest of the said F. E. Langer in said property, and not knowing that the said F. E. Langer was acting in his own behalf and in behalf of the said Kitsap County Bank and not for and in behalf of this defendant, and relying upon the statements and representations made by the said F. E. Langer to this defendant in such application as aforesaid, issued the said policy hereinbefore described. [26]

IX.

That said policy was and is void and of no effect, for the reason that the building purporting to be insured thereby and the building in which the household furnishings and personal effects were to be contained and were contained, was not at the time of the issuance of said policy, nor at any other time, nor at the time of the destruction of

said property by fire, occupied only for dwelling house purposes, and that the issuance of said policy was obtained by the false and fraudulent representations of the said F. E. Langer as aforesaid, and acting in his own interests and behalf and in behalf of the Kitsap County Bank as aforesaid.

X.

That upon learning and being informed that the said described building had been and was, at the time of the issuance of said policy and at the time of its destruction by fire, occupied and used for other than dwelling house purposes, this defendant tendered to the plaintiffs the sum of eighty-three and 25/100 dollars, the same being the true and full amount of the premium received by this defendant, as consideration for the issuance of such policy and for this defendant's undertaking thereunder, and the interest on the amount of such premium at the rate of six per cent per annum from the 10th day of August, A. D. 1935, the date of such tender.

And by way of further answer and as a second affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That it was specifically provided and set forth in the policy of fire insurance issued by this defendant in the name of William [27] Bilquist as insured on the 10th day of August, A. D. 1935, and being the same policy of fire insurance alleged by the

plaintiffs in their complaint, and in paragraph numbered III thereof, to have been issued on the 10th day of August, A. D. 1935 by this defendant, and identified as policy numbered 28222 and running to the plaintiff William Bilquist as the insured, and a part of the stipulations, covenants, conditions and agreements thereof, that the entire said policy of insurance, unless otherwise provided by agreement endorsed on or added to said policy, should be void if the interest of the assured be other than unconditional and sole ownership, or if the interest of the insured be not truly stated in such policy. That no agreement otherwise providing was ever entered into by the defendant with the insured, nor with any other person, and no such agreement was ever indorsed upon said policy of insurance, nor at any time added thereto.

II.

That in and by said policy of insurance it was stated and warranted by the insured that the title to the insured property was in the insured, William Bilquist, and it was covenanted and agreed in said policy and accepted and agreed by the insured as a condition of such insurance that such statement was a statement of fact known to and warranted by the insured to be true, and that the policy was issued by this defendant in reliance upon the truth of such statement, and that if such statement was untrue, then in that event the policy should be void.

That the said policy of insurance was issued and

accepted subject to the statement, condition and stipulation aforesaid.

III.

That the two-story frame building, insured by said policy, and the building in which the said household furniture and personal effects were to be contained while subject to and covered by said [28] policy of insurance, on the 10th day of August, A. D. 1935, at the time of the issuance of said policy, was, and for a long time theretofore had been, and thereafter until its destruction by fire on September 12th, 1936, continued to be, located on lots 1 and 2 of Block 4 and lots 8 and 9 of Block 5 of Davis Addition to Manchester, Washington, or some part thereof, and that said real estate hereinbefore in this paragraph described, and the buildings and improvements thereon, at all said times was owned by the marital community consisting of the said William Bilquist and Bessie Bilquist, his wife, and by the marital community consisting of John Myhre and Signe Myhre, his wife, as tenants in common, and that the said William Bilquist was not at the time of the issuance and accepting of said policy and was not at the time of the destruction of said property on September 12th, 1936, nor at any other time, the sole and unconditional owner of said real estate, or of the buildings and improvements thereon, nor of the two-story, shingle-roof, frame building described in said policy of insurance, nor of the household furnishings and personal effects contained therein.

IV.

That portions of the household furnishings situated in the building described in said policy of insurance and located on the property hereinbefore mentioned, on the 10th day of August A. D. 1935, and at the time of the issuing of said policy of insurance, and then situated and located in said building, and at the time of the destruction thereof by fire on the 12th day of September A. D. 1936, were not on said 10th day of August A. D. 1935, nor at any of said times, owned by the said insured nor by the plaintiffs nor any thereof, and that the household furnishings, consisting of certain range or ranges, certain refrigerator or refrigerators, and certain circulator or circulators, were acquired by the plaintiffs fom the Mitchell Sales Corporation on or prior to the 1st day of [29] August A. D. 1935, by means of and under a contract of conditional sale, wherein and whereby the title thereto was reserved and retained in the Mitchell Sales Corporation until full payment of the purchase price, and that full payment of the purchase price had not been made on the 10th day of August 1935, nor prior to the 13th day of September A. D. 1936, and that during all of said times the title of the said household furnishings was in the Mitchell Sales Corporation and not in the plaintiff, nor in any of the plaintiffs, and that the title of the said insured thereto was not at the time of the issuing of said policy, nor at the time of the destruction of said property by fire, the unconditional and sole owner-

ship required by the terms and conditions of said policy.

V.

That this defendant did not have at the time of the issuance of said policy, nor at any other time preceding the destruction of such property by fire, any knowledge, information, notice or belief that the title to the insured property was not in the name of the plaintiff William Bilquist, the insured in said policy, or that the interest of the plaintiff William Bilquist in the insured property was not that of unconditional and sole ownership.

VI.

That by reason of the false representation and breach of the conditions of said policy that the title to the insured property was in the plaintiff as the insured, and that his interest therein was that of unconditional and sole ownership, and because the interest of the assured was not truly stated therein, the said policy was and is null and void and of no effect.

VII.

That subsequently, and after the destruction of said building and of the household furnishings and personal effects by fire, and on, to-wit, the 17th day of December A. D. 1935, this defendant [30] tendered to the plaintiffs the sum of eighty-three dollars and twenty-five cents ($83.25), the same being the true and full amount of the premium paid to this defendant, as compensation for the issuance of the said policy and for its undertaking there-

under, and of the interest on the amount of such premium at the rate of six per cent per annum from the 10th day of August 1935 to the day of such tender.

And by way of further answer and as a third affirmative defense the defendant Fidelity and Guaranty Fire Corporation alleges and says:

I.

That heretofore on the 10th day of August A. D. 1935, this defendant issued its policy of insurance insuring the said plaintiff for the period of three years from said day and year against loss sustained by him from the destruction by fire, to the extent of two thousand five hundred dollars, of the two-story, shingle-roof, frame building situated on lots 1 and 2 of Block 4 and lots 8 and 9 of Block 5 of Davis Addition to Manchester, Washington, or some part thereof, while occupied only for dwelling house purposes, and to the extent of fifteen hundred dollars against loss sustained by him by reason of the destruction by fire of the household furnishings and personal effects contained in the above described dwelling house building, the same being policy No. 28222, and being the same policy referred to by the plaintiffs in paragraph numbered III of their complaint in this action.

II.

That on the 10th day of August A. D. 1935, and at the time of the issuance by this defendant of such policy, the building attempted to be covered by such

policy of insurance and described therein was not then being occupied only for dwelling house [31] purposes as provided and limited in said policy, but then was, and for a long time theretofore had been by the said insured used and occupied as a place of business, and particularly as an inn or hotel under the name of Manchester Inn, where meals and lodgings were offered and furnished to the public for compensation, which said occupancy for business purposes was at all times prior to September 12th, 1936 unknown to this defendant.

III.

That thereafterwards, and on or about the 26th day of March A. D. 1936, and subsequent to the issuance of said policy of insurance, and prior to the destruction of said building by fire on September 12th, 1936, one Ervin Moen, who, this defendant is informed and believes and therefore so avers, was an employee, co-partner, lessee of or joint adventurer with the plaintiffs, filed with the Washington State Liquor Control Board an application for a beer and wine license authorizing and licensing the sale of beer and wines upon the said premises and in the building then known as Manchester Inn, and being the same building described in and covered by said policy of insurance issued by this defendant in the name of the plaintiff William Bilquist.

That thereupon and on April 6, 1936 licenses for the sale of beer and wines on said premises, both for consumption on said premises and for consumption off said premises, were by said Washington State

Liquor Control Board issued to the said Ervin Moen, licensing and authorizing the sale of beer and wines upon said premises and in the building covered by said policy of insurance.

And this defendant further says that after said 6th day of April A. D. 1936, and continuously thereafter and until the destruction of said building by fire, portions of said building were used for and occupied as a public beer and wine parlor or salesroom for the sale and dispensing of beer and wine to the public generally, [32] to be consumed on said premises, and for a public dance and music hall where public dancing to music was permitted and allowed for compensation, and in which the sale of beer and wine and the drinking thereof, and the dancing, continued until late hours, and such building had not been, prior to said day and year last aforesaid, so used or occupied.

That such use of the premises was well known to the plaintiffs and each and all of them, and as this defendant is informed and believes, and therefore so avers, was conducted and carried on by the plaintiffs for their benefit, profit and advantage, either personally or through the said Ervin Moen as their agent or employee, or representative, or as a joint adventurer.

That the use of said building or portions thereof for the sale of beer and wine for consumption on said premises, together with the use of the said building, or portions thereof for a place of public dancing, and open to the public as a place of danc-

ing, caused large numbers of persons to frequent and make use of said building as a place of public resort, and as a place for smoking, dancing and the drinking of wine and beer, and to continue such smoking, dancing and drinking until late hours of the night or the early hours of the morning, and such use greatly increased the hazard and liability to destruction by fire over the hazard and liability incident to the occupancy of said building as an inn or hotel, and very greatly increased the hazard and liability to destruction by fire over that to which it was subjected by occupancy for and use solely as a dwelling house.

That the application for such license to sell and vend beer and wines and the granting of licenses therefor, and the use of said building, or portions thereof, for the purpose of selling and vending wines and beer and for public dancing and as a place of public resort for such purposes, was to this defendant wholly [33] unknown, and this defendant did not and has not at any time consented thereto.

That said insured premises were situated in Manchester, Washington, which was and is a small, unorganized community without organized local government and without police protection, and without adequate, or any, protection against fire.

That the use of said building as a place for the sale of beer and wines to be consumed on the premises, and as a place of public resort for smoking, dancing and drinking of beers and wines, rendered said insured building a hazardous, undesir-

able and uninsurable risk, and had such use been made known to this defendant it would have refused to continue such insurance and would have cancelled such policy.

That it is provided and set forth in said policy of insurance, and one of the stipulations and conditions upon which said policy was issued and to which it is and at all times was subject, that the entire policy should be void, unless otherwise provided by agreement endorsed thereon or added thereto, if the hazard of such insurance be increased by any means within the knowledge or control of the insured.

That no agreement otherwise was ever made or endorsed upon such policy of insurance, and such use and increased hazard was not consented to by this defendant and was to it unknown until after the destruction of said building by fire. That such increase in hazard by the use of portions of said building as a place for vending and sale of beers and wines for consumption on the premises and as a place of public resort for smoking, drinking and for dancing was within the control and knowledge of the insured.

That by reason of the violation of the terms, conditions and stipulations of such policy of insurance and by an increase of the hazard by means within the knowledge and control of the insured, [34] as aforesaid, the said policy became and was and is null and void and of no effect.

That subsequently and after the destruction of said building and of said household furnishings and

personal effects by fire, and on, to-wit, the 17th day of December A. D. 1935, this defendant tendered to the plaintiffs the sum of eighty-three dollars and twenty-five cents ($83.25), the same being the true and full amount of the premium paid to this defendant as compensation for the issuance of said policy and for its undertaking thereunder, and of the interest on the amount of such premium, at the rate of six per cent per annum from the 10th day of August A. D. 1935, to the day of such tender. [35]

Wherefore this defendant prays that the plaintiffs take nothing by their said action and that judgment be entered in favor of this defendant, and that this defendant recover its costs and disbursements.

Dated March 31st A. D. 1937.

FIDELITY FIRE AND
GUARANTY CORPORATION
By DAVIS AND GROFF
Its Attorneys

DAVIS AND GROFF
Attorneys for Defendant
Fidelity and Guaranty Fire Corporation
1333 Dexter Horton Building
Seattle, Washington. [37]

State of Washington
County of King—ss.

I, Guy B. Groff, being first duly sworn, on oath depose and say:

That I am a resident of the city of Seattle in the County of King and State of Washington, of

full and lawful age, a citizen of the United States of America, and one of the attorneys for the defendant Fidelity and Guaranty Fire Corporation in the above entitled action.

That the defendant Fidelity and Guaranty Fire Corporation is a corporation organized and existing under and by virtue of the laws of the State of Maryland and having its principal office and place of business at the City of Baltimore in such state of Maryland, and that it has no agent or officer within the State of Washington authorized to make this verification. That for the reasons aforesaid I make this verification as the attorney of the said Fidelity and Guaranty Fire Corporation and for and in its behalf.

That I have read the foregoing answer and know the contents thereof, and that the matters and things therein stated and set forth are true in fact, as I verily believe.

GUY B. GROFF

Subscribed and Sworn to before me by the above named Guy B. Groff in the City of Seattle in said County, this 31st day of March A. D. 1937.

[Seal] MERVYN F. BELL

Notary Public in and for the State of Washington, residing at Seattle.

Copy received Apr. 9, 1937.

RAY R. GREENWOOD

By F. M.

Atty. for Plaintiff.

[Endorsed]: Filed Apr. 10, 1937. [38]

[Title of District Court and Cause.]

REPLY

Come now the plaintiffs and in reply to the affirmative defenses, set forth in the answer of the Fidelity and Guaranty Fire Corporation, admit, deny, and state as follows:

I.

Replying to Paragraph II of the first affirmative defense, plaintiffs deny the same, and each and every allegation therein contained, subject only to the admissions and allegations set forth and contained in the complaint herein.

II.

Replying to Paragraph III, plaintiffs deny each and every allegation contained therein.

III.

Replying to Paragraph IV, plaintiffs admit the same and allege that the said F. E. Langer was also general agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore and entitled to subscribe and deliver policies without first submitting any application therefor to any person.

IV.

Replying to Paragraph V, plaintiffs admit that said building was described as a dwelling house in the policy herein and that the furnishings were situated in said building; also admit that said building was used as an inn, but re-allege, as in the com-

plaint herein, that said fact was within the knowledge of the defendants and their agent, and that the description in said policy was placed there on the initiative of the defendants themselves.

V.

Replying to Paragraph VI, plaintiffs admit the same. [39]

VI.

Replying to Paragraph VIII, plaintiffs deny each and every allegation therein contained, except the plaintiffs admit that the said F. E. Langer, as the agent of the defendant Fidelity and Guaranty Fire Corporation, knew that the building described in the policy was used as a hotel and an inn; and plaintiffs further admit that the said F. E. Langer, as agent of this defendant Fidelity and Guaranty Fire Corporation, knew that the personal property described in said policy was kept in a building not used for dwelling house purposes; and plaintiffs further admit that the policy was made payable to the Kitsap County Bank, as in said paragraph alleged, and to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interest might appear; and plaintiffs further admit that all matters and things connected to the making of the same and the insurance of said policy were all known to F. E. Langer, agent of the defendant and acting in that capacity, and admit that the policy was issued by the plaintiffs on account of the application of F. E. Langer; and

further allege that said policy was issued and signed by him as agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and that all things in connection with said matter had represented the defendants and not the plaintiffs, or any of them.

VII.

Replying to Paragraph IX, plaintiffs deny each and every allegation therein contained.

VIII.

Replying to Paragraph X, plaintiffs admit that the defendant tendered to plaintiffs the sum of eighty-three and 25/100 dollars ($83.25), as therein alleged:

For a Reply to the Second Affirmative Defense Herein, plaintiffs admit, deny, and allege as follows:

I.

Replying to Paragraph I, plaintiffs deny each and every allegation contained therein, except as may be admitted and qualified in the allegations of the complaint. [40]

II.

Plaintiffs deny each and every allegation contained in Paragraph II, except as may be qualified by the allegations of the complaint, and especially deny that any fraudulent act was done or alleged by plaintiffs, or any of them, in connection with the securing of this insurance.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the allegations of the complaint.

IV.

Replying to Paragraph IV, plaintiffs deny the same and all the allegations therein contained.

V.

Replying to Paragraph V, plaintiffs deny each and every allegation therein contained.

VI.

Replying to Paragraph VI, plaintiffs deny each and every allegation therein contained.

VII.

Replying to Paragraph VII, plaintiffs admit the tender of $83.25, as therein alleged.

Further replying thereto and specially replying to the third affirmative defense of the Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, plaintiffs admit, deny, and allege as follows:

I.

Plaintiffs admit Paragraph I thereof.

II.

Replying to Paragraph II, plaintiffs admit the same, excepting that the plaintiffs deny that part thereof commencing with the word "which" at the end of the third line from the end of said paragraph to the end thereof.

III.

Replying to Paragraph III, plaintiffs admit the same, excepting that they deny that any of the acts or things done were without the knowledge of the defendants or their agent, but alleges [41] that they were within their knowledge at all times, and that the entire purposes for which said buildings was to be used were well known to the defendants, and all of them at all times on and since the date of the policy of insurance sued on herein. Plaintiffs further deny that anything done upon said premises materially increased the risk for insurance purposes, as in said paragraph alleged.

Wherefore, having fully replied herein, plaintiffs pray judgment as in the complaint.

RAY R. GREENWOOD
Attorney for Plaintiffs

State of Washington
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

JOHN MYHRE

Subscribed and Sworn to before me this 3rd day of September, 1937.

RAY R. GREENWOOD
Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Sep. 22, 1937. [42]

[Title of District Court and Cause.]

AMENDED REPLY

Comes now the plaintiffs and in reply to the affirmative defenses, set forth in the answer of the Fidelity and Guaranty Fire Corporation, admit, deny, and state as follows:

I.

Replying to Paragraph II of the first affirmative defense, plaintiffs deny the same, and each and every allegation therein contained, subject only to the admissions and allegations set forth and contained in the complaint herein.

II.

Replying to Paragraph III, plaintiffs deny each and every allegation contained therein.

III.

Replying to Paragraph IV, plaintiffs admit the same and allege that the said F. E. Langer was also general agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore and entitled to subscribe and deliver policies without first submitting any application therefor to any person.

IV.

Replying to Paragraph V, plaintiffs admit that said building was described as a dwelling house in the policy herein and that the furnishings were situated in said building; also admit that said building was used as an inn, but re-allege, as in the com-

plaint herein, that said fact was within the knowledge of the defendants and their agent, and that the description in said policy was placed there on the initiative of the defendants themselves.

V.

Replying to Paragraph VI, plaintiffs admit the same. [43]

VI.

Replying to Paragraph VIII, plaintiffs deny each and every allegation therein contained, except the plaintiffs admit that the said F. E. Langer, as the agent of the defendant Fidelity and Guaranty Fire Corporation, knew that the building described in the policy was used as a hotel and an inn; and plaintiffs further admit that the said F. E. Langer, as agent of this defendant Fidelity and Guaranty Fire Corporation, knew that the personal property described in said policy was kept in a building not used for dwelling house purposes; and plaintiffs further admit that the policy was made payable to the Kitsap County Bank, as in said paragraph alleged, and to Clarence Jones, second mortgagee, and to John Myhre and Signe Myhre, third mortgagees, as their interest might appear; and plaintiffs further admit that all matters and things connected to the making of the same and the insurance of said policy were all known to F. E. Langer, agent of the defendant and acting in that capacity, and admit that the policy was issued by the plaintiffs on account of the application of F. E. Langer; and

further allege that said policy was issued and signed by him as agent of the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, and that all things in connection with said matter had represented the defendants and not the plaintiffs, or any of them.

VII.

Replying to Paragraph IX, plaintiffs deny each and every allegation therein contained.

VIII.

Replying to Paragraph X, plaintiffs admit that the defendant tendered to plaintiffs the sum of eighty-three and 25/100 dollars ($83.25), as therein alleged:

For a Reply to the Second Affirmative Defense Herein, plaintiffs admit, deny, and allege as follows:

I.

Replying to Paragraph I, plaintiffs deny each and every allegation contained therein, except as may be admitted and qualified in the allegations of the complaint. [44]

II.

Plaintiffs deny each and every allegation contained in Paragraph II, except as may be qualified by the allegations of the complaint, and especially deny that any fraudulent act was done or alleged by plaintiffs, or any of them, in connection with the securing of this insurance.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the allegations of the complaint.

IV.

Replying to Paragraph IV, plaintiffs admit that on the 1st day of August, 1935, they purchased under conditional contract of sale from the Mitchell Sales Corporation of Bremerton, Washington, one (1) Lange Range, one (1) Norge Refrigerator, and one (1) wood and coal circulator, which property they received in their possession and was placed upon the premises covered by the insurance policy sued on herein. Relative thereto, however, these plaintiffs allege that defendants made no inquiry whatsoever concerning the title to said property. That these plaintiffs made no representations and filed no application therefor, and allege that the warranty relative to the sole and unconditional ownership set forth in said policy was not material to the risk, and relative thereto plaintiffs further state that they paid in full for all of said property and became the unconditional owners thereof on the first day of August, 1936, and were the unconditional owners thereof upon the date of said fire.

V.

Replying to Paragraph V, plaintiffs deny each and every allegation therein contained.

VI.

Replying to Paragraph VII, plaintiffs admit the tender of $83.25, as therein alleged.

Further replying thereto and specially replying to the third affirmative defense of the Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, plaintiffs admit, deny, and allege as follows:

[45]

I.

Plaintiffs admit Paragraph I thereof.

II.

Replying to Paragraph II, plaintiffs admit the same excepting that the plaintiffs deny that part thereof commencing with the word "which" at the end of the third line from the end of said paragraph to the end thereof.

III.

Replying to Paragraph III, plaintiffs admit the same, excepting that they deny that any of the acts or things done were without the knowledge of the defendants or their agent, but allege that they were within their knowledge at all times, and that the entire purposes for which said building was to be used were well known to the defendants, and all of them, at all times on and since the date of the policy of insurance sued on herein. Plaintiffs further deny that anything done upon said premises materially increased the risk for insurance purposes, as in said paragraph alleged.

Replying to the fourth affirmative defense, these plaintiffs state:

I.

Replying to Paragraph I, plaintiffs deny the same, excepting as may be qualified and admitted by the allegations of the complaint herein.

II.

Replying to Paragraph II, plaintiffs deny the same.

III.

Replying to Paragraph III, plaintiffs deny each and every allegation therein contained, except as may be admitted and qualified by the affirmative matter of this reply.

Wherefore, having fully replied herein, plaintiffs pray judgment as in the complaint.

RAY R. GREENWOOD
Attorney for Plaintiffs.

State of Washington,
County of Kitsap—ss.

John Myhre, being first duly sworn, on oath, deposes and says: That he is one of the plaintiffs in the above entitled action; that he has read the foregoing Amended Reply, knows the contents thereof, and believes the same to be true.

JOHN MYHRE [46]

Subscribed and sworn to before me this 26th day of January, 1938.

RAY R. GREENWOOD

Notary Public in and for the State of Wash., residing at Bremerton.

[Endorsed]: Filed Jan. 27, 1938.

[47]

[Title of District Court and Cause.]

TRIAL RECORD, SHOWING IMPANELMENT OF JURY

Now on this 27th day of January, 1938, Ray R. Greenwood and H. Sylvester Garvin appearing for the plaintiffs, Guy B. Groff and Mervyn F. Bell, appearing for the defendant Fidelity and Guaranty Fire Corporation of Baltimore, Md. the defendant F. E. Langer is not in court, not having been removed from the State Court, this cause is called for trial, all parties announcing they are ready. The plaintiff files amended reply, and also files trial brief. Defendant files trial brief. A trial jury is impanelled and sworn as follows: W. B. Kimball, John W. Hageman, Chas. W. Harbaugh, Jacob A. Rasmussen, Roy W. Millikan, Julia E. Dolan, H. C. Comeau, Ora E. Pierce, Samuel Graham, Henry C. Ristine, C. C. Richesen and Wilbur F. Henry. During selection of the jury sworn, the following jurors were excused either through peremptory challenge or otherwise: Albert W. Tenney, W. E. Haack,

W. P. Cameron, C. B. Irish. At 10:55 A.M., the jury is admonished and a ten minute recess is declared and taken, pursuant to which the trial is again resumed with all jurors and parties with their counsel present. Opening statement is made by the plaintiffs, and reserved by the defendant. Plaintiff's witness John Myhre is sworn and examined. Plaintiff's exhibits numbered 1, 2, 3 and 4 are admitted in evidence. At 11:50 o'clock A. M., on request of the defendant the jury is excused until two o'clock, P. M., today to give opportunity of making argument on motions to strike certain testimony. Motion is denied. Exception is allowed. The trial at 12:17 o'clock, P. M., is thereupon recessed to two o'clock, P. M. at which time it is again resumed, roll call of the jury being waived, jury all present, and parties and counsel present. Witness Myhre resumes the witness stand for cross-examination. Plaintiff tenders requested instructions in duplicate, the original being given the Court, the duplicate being filed. Plaintiff's witness Bessie Bilquist is sworn and examined. At 3:20 P. M., a ten minute recess [48] is declared and taken pursuant to which the trial is again resumed, all jurors and parties and counsel being present. Witness Bessie Bilquist resumes the witness stand. Plaintiff's witnesses William Bilquest, Ervin Moen, Fred Vetters, Alan Totten, Olaf Nelson and F. E. Langer are sworn and examined. Plaintiff's exhibits numbered 5 and 7 are admitted in evidence.

Exhibit numbered 6 is not offered. Withdrawn. At 4:30 P.M., the trial is continued until 10 A.M., tomorrow.

Journal No. 25, page 424. [49]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiffs, and fix the amount of their recovery in the sum of Four Thousand no/100 Dollars ($4000.00).

H. C. RISTINE
Foreman

[Endorsed]: Filed Feb. 1, 1938. [50]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NON OBSTANTE VERDICTO

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, by Davis and Groff, its attorneys, and moves the Court to enter a judgment for the defendant, Fidelity and Guaranty Fire Corporation, notwithstanding the verdict of the jury heretofore empanelled and sworn and by it returned into Court in this cause, for the following reasons, to-wit:

1. Because it appears, by the undisputed and uncontradicted evidence in the case, that it was covenanted and agreed in the policy of insurance upon which recovery was sought, and one of the conditions thereof, that the entire policy should be void, unless otherwise provided by agreement endorsed on the policy or added thereto, if the hazard be increased by any means within the control or knowledge of the insured; that no agreement otherwise providing was endorsed on said policy or added thereto; that subsequent to the issuing of the policy the hazard of the insurance was increased by the use of the insured premises as a place for the public vending and sale of wines and beer and as a place of public dancing for compensation; that the use constituting such increased hazard was within the knowledge and control of the [51] insured, and that no request was made by the insured of the defendant or of its agent for modification of the policy to permit the use resulting in the increased hazard; that such use was unknown to the defendant or to its agent; and that by reason of such uncontroverted evidence, the defendant was entitled to a judgment in its favor as a matter of law, and no issue of fact existed proper to be submitted to the jury.

2. Because it appears, by the undisputed and uncontradicted evidence in the case, that it was covenanted and agreed in the policy of insurance upon which recovery was sought, and one of the conditions thereof, that the entire policy should be void, unless otherwise provided by agreement en-

dorsed on the policy or added thereto, if the hazard be increased by any means within the knowledge or control of the insured; that no agreement otherwise providing was endorsed on said policy or added thereto; that subsequent to the issuing of the policy the hazard of the insurance was increased by the use of the insured premises as a garage and as a place for the keeping and storing of automobiles, and by keeping and storing automobiles underneath the insured building; that the use constituting such increased hazard was within the knowledge and control of the insured, and that no request was made by the insured of the defendant or of its agent for modification of the policy to permit the use resulting in the increased hazard; that such use was unknown to the defendant or to its agent; and that by reason of such uncontroverted evidence, the defendant was entitled to a judgment in its favor as a matter of law, and no issue of fact existed proper to be submitted to the jury.

3. Because the Court improperly, and over the defendant's objection, admitted oral evidence of the knowledge of the defendant's agent that the insured building was used and occupied as an inn or hotel at the time of the writing of the policy of insurance [52] on which recovery is sought, as tending to modify or alter the contract arising out of such policy of insurance, in violation of the terms and conditions of the policy upon which the same was accepted, in the words and figures following:

> "This Policy is made and accepted subject to the foregoing stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions of conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached."

and submitted to the jury the question of whether or not the plaintiff was entitled to recover because of such knowledge of such agent; that under such policy of insurance, the knowledge of the agent was not sufficient to justify the reformation of the contract created by the policy of insurance, so as to permit recovery for loss by fire while the insured building was occupied as an inn or hotel; and that no issue of fact existed material to the alleged right of the plaintiff to recover necessary or proper to be submitted to the jury.

In presenting this motion for a judgment in its favor, notwithstanding the verdict of the jury, the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, Maryland, does not in any manner waive or relinquish its right to present, urge and argue its alternative motion that the Court grant it a new trial of this cause in the event that this motion for judgment in its favor, notwithstanding the verdict, be denied.

FIDELITY AND GUARANTY FIRE CORPORATION
of Baltimore, Maryland
By DAVIS & GROFF
Its Attorneys [53]

Service of copy of within Motion hereby acknowledged this 5 day of Feb., 1938.

RAY R. GREENWOOD
Attorney for Plaintiffs

[Endorsed]: Filed Feb. 7, 1938. [54]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

At a session of the Honorable District Court of the United States for the Western District of Washington, of the Northern Division thereof, held at the City of Seattle in said district on the 21st day of February, 1938, the Hon. John C. Bowen, Judge of said Court, presiding, this cause came on further to be heard upon the motion of the defendant, Fidelity and Guaranty Fire Corporation, for a judgment in its favor notwithstanding the verdict of the jury, and, in the alternative, for a new trial; and the plaintiffs appearing by Ray R. Greenwood, their attorney, and the defendant appearing by Davis and Groff, its attorneys; and the Court having heard oral argument by counsel and having read and examined the briefs filed by counsel, and having fully considered the defendant's motion for a judgment for and in favor of said defendant notwithstanding the verdict of the jury, it is by the Court ordered, adjudged and decreed that the defendant's said motion for a judgment notwithstanding the verdict of the jury be and the same is hereby denied.

That thereupon the defendant asked for and was granted an exception to the order denying its said motion, such exception being based upon the following grounds:

1. Because at the time of the loss for which the plaintiffs seek recovery under the policy sued upon, the insured real property was not being used only for [55] dwelling house purposes, nor was the insured personal property located in a dwelling house building.

2. Because it appears by the uncontradicted evidence that subsequent to the issuing of the policy of insurance upon which the plaintiffs sue, the hazard of the insurance was increased with the consent and under the control of the insured through the use of the insured premises as a place for the sale of beers and wine to the public and as a place of public dancing, and that by reason thereof the policy became void.

3. Because it appears that at the time of the issuing of the policy of insurance on which plaintiffs sue, and at the time of the loss, the interest of the insured William E. Bilquist in the insured property was other than that of sole and unconditional ownership, and that by reason thereof the policy was void.

Thereupon the defendant asked leave to withdraw its alternative motion for a new trial, without prejudice to its right to file a new motion for a new trial within the time allowed by the Acts of Congress and the rules of Court for filing motions for new trials.

Upon consideration, the said motion is by the court granted and the defendant has leave to withdraw its said motion for a new trial, without preju-

dice to its right to file a new motion for a new trial at any time within the period allowed by the statutes and rules of Court for filing motions for new trials.

Done in open court at the City of Seattle in said district this 28th day of February, 1938.

JOHN C. BOWEN
Judge

Correct as to form:

RAY R. GREENWOOD
Attorney for Plaintiffs

DAVIS and GROFF
Attorneys for Defendant

[Endorsed]: Filed Feb. 28, 1938. [56]

[Title of District Court and Cause.]

WITHDRAWAL OF MOTION FOR NEW TRIAL

Comes now the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, and by leave of Court first had and obtained, herewith withdraws its motion in the alternative, heretofore filed, and now on file, for an order granting a new trial of the above entitled cause.

FIDELITY AND GUARANTY FIRE CORPORATION
of Baltimore, Defendant
By DAVIS & GROFF
Its attorneys

[Endorsed]: Filed Apr. 11, 1938. [57]

In the District Court of the United States for the Western District of Washington, Northern Division

No. 21098

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,

Plaintiffs,

vs.

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, Maryland, a corporation engaged in the business of writing fire insurance in the State of Washington,

Defendant.

JUDGMENT

Be it remembered that the above cause came on regularly for trial on the 27th day of January, 1938, before a jury, the plaintiffs being then and there present in court and by their attorneys, Ray R. Greenwood, Esquire, and H. Sylvester Garvin, Esquire, and the defendants being represented in court by its attorneys, Davis and Groff, and all parties having announced ready for trial, and the jury having been empanelled and sworn to try the case, and the evidence having been received, and said cause continued through the 28th of January, and having been then continued to and concluded on Tuesday, the 1st day of February, 1938, and the cause having been submitted to the jury, and the verdict having been rendered therein in favor of the plaintiffs and

against the defendants in the sum of four thousand dollars ($4000.00); and it appearing that the plaintiffs' action was based upon a policy of fire insurance insuring the plaintiff William E. Bilquist in part against loss or damage by fire of a certain building to an amount not exceeding twenty-five hundred dollars, and the loss, if any, was by said policy made payable to the Kitsap County Bank of Port Orchard, Washington, as its interest may appear;

Now, therefore, upon motion of the attorneys for the plaintiffs for judgment in accordance with the verdict, it is hereby [58]

Ordered and adjudged that the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, have and recover of the defendant, Fidelity and Guaranty Fire Corporation, the sum of twenty-five hundred dollars ($2500.00), together with interest thereon at the rate of six per cent per annum from the first day of February, 1937, until paid and satisfied, and that the amount of said judgment be payable to the Kitsap County Bank of Port Orchard, Washington, in trust for itself and the plaintiffs as their interests may appear.

And it is further ordered, adjudged and decreed that the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, do have and recover of the defendant, Fidelity and Guaranty Fire Corporation, the further sum of fifteen hundred dollars ($1500.00), with interest thereon from the first day of February, 1937, until paid and satisfied, together

with their costs of the action taxed and allowed by the court at ninety-two and 20/100 dollars ($92.20).

The defendant asks and is allowed the following exceptions:

First. To the judgments as entered.

Second. To the inclusion in the judgment entered of interest, upon the ground that the plaintiffs are not entitled to recover interest prior to the entry of judgment, not having asked for interest in their complaint and none having been allowed by the verdict of the jury.

Done in open court at Seattle, Washington, this 28th day of February, 1938.

JOHN C. BOWEN
Judge

Presented by:
H. SYLVESTER GARVIN
Approved as to form:
RAY R. GREENWOOD
H. SYLVESTER GARVIN
Attorneys for Plaintiffs
DAVIS & GROFF
Attorneys for Defendant

[Endorsed]: Filed Feb. 28, 1938. [59]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that in the trial of this cause in and before the United States District Court of

and for the Western District of Washington, the Honorable John C. Bowen, Judge of said court presiding, begun on the 27th day of January, 1938, and continued through the 28th day of January, 1938, and thence continued and completed on the first day of February, 1938, and the defendant being represented by Mr. Guy B. Groff of Davis and Groff, its attorneys and counsel, and the plaintiffs being represented by Mr. Ray R. Greenwood and Mr. H. Sylvester Garvin, their attorneys and counsel, and a jury being duly empanelled and sworn, the following proceedings were had and testimony taken:

JOHN MYHRE,

a plaintiff, called and sworn as a witness for plaintiffs, upon

Direct Examination

testified as follows:

My name is John Myhre. I am one of the plaintiffs and reside at Port Orchard, where I have a restaurant and an interest in a beer parlor. I knew the Bilquists in North Dakota in 1923. They came to this country in 1935.

We bought the Manchester Inn in partnership from Mr. Haas, a real estate man in Port Orchard. There were four lots [60] the same as described in the policy, and we paid $3500.00. It was an inn of 11 rooms upstairs, four rooms and a lobby downstairs, a wooden frame building on a pile foundation and not in very good condition. We replaced

(Testimony of John Myhre.)

piling, built porch over, painted and redecorated inside and replaced furniture, sanded and varnished the floors. The total cost was between six and seven hundred dollars. When we bought we secured a loan of $1500.00 from the Kitsap County Bank, and Langer said he wanted to write the insurance and I told him he could. He came to my restaurant and asked me how much insurance to write. We agreed on $2500.00 on the building and $1500.00 on the furniture. I did not tell him how to write it. When we bought, there was a mortgage for one thousand dollars on the property to Haas; assigned to Jones, and one year later acquired by the bank. Mr. and Mrs. Bilquist and I had signed a mortgage and filed it with him. Later, at the bank, Langer showed me the policy folded up and said, I have got your policy. I looked at the name William Bilquist on it and said, If I am going to pay for that I want my name on it; I am half owner in that place. Langer said, We will have it changed then. I did not see the inside. I never inquired whether it had been changed. Shown plaintiff's Exhibit 1, he stated that it was the policy folded as he exhibited it to me. The witness having been shown plaintiff's Exhibit 2, said that it was for $77.00 drawn on his account for insurance. I did not see the policy afterwards. Langer kept it in the bank. When we purchased the property we intended to use it as an inn, of which we advised Langer, and immediately began fitting it up as an inn; it has no use for any

(Testimony of John Myhre.)

other purpose. Mr. and Mrs. Bilquist lived there practically all the time. We bought a refrigerator, a range and a heat circulator from the Mitchell Sales Co. on a conditional sales contract, which was paid in full before August 1, 1936.

Plaintiff's Exhibit No. 1 offered on behalf of the plaintiff and admitted. [61]

PLAINTIFFS' EXHIBIT No. 1

consisted of the defendant's policy of insurance No. 28222 with the Standard Forms Bureau form No. 548 attached thereto, and made a part thereof, and the riders and clauses thereto attached and made a part thereof, issued to William E. Bilquist on August 10, 1935, so far as such riders and clauses are material to or affect any question arising in this action, or upon this appeal, is in the words and figures following:

Standard Fire Insurance Policy

No. 28222 Stock Company

Fidelity and Guaranty
Fire Corporation
Baltimore

Amount $4000. Rate 1.925 Premium $77.00

In Consideration of the Stipulations herein named and of Seventy seven and no/100 Dollars Premium, does insure William E. Bilquist for the term of Three years from the 10 day of August 1935, at noon (Standard Time) to the

(Testimony of John Myhre.)

10 day of August 1938, at noon, (Standard Time) against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Four thousand and no/100 Dollars, to the following described property while located and contained as described herein and not elsewhere, to wit:

Standard Forms Bureau Form 548 (Oct. 1931)

Unprotected Dwellings (Including Seasonal Dwellings and Summer Cottages) and Private Stables, Outbuildings and Private Garages in Connection Therewith.

On the following described property, all only while situate Lots 1 and 2 of block 4, also lots 8 and 9, block 5, Davis Addition to Manchester, Washington.

*1. $2500.00 On the two story, shingle roof, frame building and additions in contact therewith while occupied only for dwelling house purposes. All permanent fixtures, including attached fittings, for supplying and/or utilizing water, steam, gas, electricity and/or air for heating, lighting and/or ventilating said building to be construed as a part of it only while installed therein or thereon. Awnings, storm and screen doors and windows for said building to be covered by this insurance while

(Testimony of John Myhre.)

attached to or stored therein and/or while stored in other buildings situate on the same premises.

*2. $1500.00 On household furnishings and personal effects, including casts, curiosities, sculptures, jewels, medals, pictures, scientific apparatus, drawings, dies, implements, tools, food and fuel [62] owned by insured and/or members of his family; all only while contained in the above described dwelling house building. Awnings, storm and screen doors and windows (if the property of the tenant and not otherwise insured) to be covered by this insurance while attached to or stored in the above described dwelling house building and/or while stored in other buildings situate on the same premises.

Warranties

The following are Statements of Facts known to and warranted by the insured to be true, and this Policy is issued by the Company Relying on the truth thereof; if any of such statements of fact is untrue, this Policy shall be void:

Title: The title to the insured property is in name of William E. Bilquist

(Testimony of John Myhre.)

Encumbrance: No encumbrance on land except $2500.00. No encumbrance on personal property except $..... Encumbrance is not past due except No except
Property is not in litigation or dispute except No except

Other Insurance: There is no other insurance on this identical property except as follows:

Item 1: $ None Item 2: $ None
The insured has never had a loss by fire except No except The insured has never had policies cancelled except by the following companies: No except

(Testimony of John Myhre.)

Rate Information	Dwelling House Credits	Charges	Basis
Are electric lights used throughout? In Dwelling Yes	$10		
Is roof entirely covered with metal, tile, slate or composition roofing material? Dwelling No			
Are foundations of stone, brick or concrete and continuous under all walls (not pier construction)? Dwelling No			
Has exterior frame construction been thoroughly paint within the last 5 years? Dwelling No; or are all exterior walls stuccoed or brick-veneered? Dwelling No			
Are all chimneys of Dwelling of brick, natural stone or rock? Yes	$15		
Are all rooms of Dwelling plastered on lath or sheathed with plaster or wall board throughout? Yes	$15		
Occupancy: Is Dwelling occupied by owner? Yes			
Is Owner's Occupancy Warranty to be attached to this policy? Yes	$15 Total Cr. = $55		
Are there any artificial stone, earthenware, tile, terra cotta, cement, gypsum block or filled chimneys? In Dwelling No			
			[63]
Are there any stovepipes or metal stacks? In Dwelling No			
Has Dwelling canvas sides and/or roof? No			

det

Note: If building is exposed, furnish information called for on back of this form.

(Testimony of John Myhre.)

The provisions printed on the back of this form are hereby referred to and made a part hereof.

Attached to Policy No. 28222 of the Fidelity and Guaranty Fire Corporation

Agency at Port Orchard, Washington, Dated August 10, 1935.

F. E. LANGER

Agent

For other provisions see reverse side of this rider

This Policy is made and accepted subject to the foregoing stipulations and conditions, and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this Policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor

(Testimony of John Myhre.)

shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized Agent of the Company at Port Orchard.

FRANK A. GANTERT
President
J. TABB ROBERTSON
Secretary

Countersigned at said Agency this 10 day of August 19.....

F. E. LANGER
Agent

Printed upon the back of the policy and therein referred to in and made a part of the policy were certain conditions and stipulations upon which the policy was made and accepted, relevant and material to the questions and issues arising upon the trial of this cause and upon this appeal, and which were as follows: [64]

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according

(Testimony of John Myhre.)

to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the

(Testimony of John Myhre.)

property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed;

(Testimony of John Myhre.)

or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, [65] naphtha, nitro-glycerine or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, in-

(Testimony of John Myhre.)

surrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, *patters,* pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes,

(Testimony of John Myhre.)

and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation

(Testimony of John Myhre.)

having an interest in the subject of [66] insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best

(Testimony of John Myhre.)

possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

(Testimony of John Myhre.)

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select [67] a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or

(Testimony of John Myhre.)

proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance whether valid or not, or by solvent or insolvent insurance, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

(Testimony of John Myhre.)

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representatives of the insured, and whenever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage". If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

Upon the back of the rider, form 548, attached to the policy and made a part of the rider and of the policy, were printed the following provisions and clauses:

Restriction in Case of Specific Insurance.

No article or piece of personal property separately insured for a specific amount under this, or any other policy, is covered by this policy except for such specific amount, if any, named herein.

(Testimony of John Myhre.)

Guests and Servants Clause.

Not exceeding ten (10%) per [68] cent of the amount of any item of this policy on personal effects shall cover also, as per above form, property of guests (not including guests for compensation) and servants, loss if any, to be adjusted with and payable to the insured named in this policy, but in no event shall the aggregate claim for loss under any item of this policy exceed the amount of insurance specified and inserted in the blank immediately preceding the item.

Permits.

Permission granted for the within described premises to be and remain vacant for a period not exceeding 10 days at any one time, the term "vacant" being construed to mean an empty building devoid of personal habitation; or to be and remain unoccupied for a period not exceeding 30 days at any one time, the term "unoccupied" being construed to mean a building that is entirely furnished, but with personal habitants temporarily absent. It is understood that a building not intended for human occupancy shall be deemed to be unoccupied or vacant (as the case may be) if the dwelling house appurtenant to such building be unoccupied or vacant (as the case may be) as herein defined. If the premises are vacant for a period exceed-

(Testimony of John Myhre.)

ing 10 days, or unoccupied for a period exceeding 30 days, at any one time, this policy is void unless a special form of permission is attached hereto.

Permission granted for such use of the premises as is usual and incidental to the occupancy as described herein, and to keep and use articles and materials usual and incidental to such occupancy in such quantities as the exigencies of the occupancy require.

Permission granted to make alterations, improvements and repairs to any building herein described, and to complete same if under construction, and the insurance, if any, hereunder, on such building is hereby extended and made to cover such alterations, improvements and repairs, and the building materials and supplies therefor or entering into the construction of such building, while contained therein or on the premises immediately adjacent thereto.

Incubator and/or Brooder Prohibition Warranty.

Warranted by the insured that incubators and/or brooders will not be operated during the life of this policy in any of the within described buildings (including incubator and/or brooder houses) unless a specific permit therefor is made a part of this policy. A breach of this warranty suspends, during such breach, the in-

(Testimony of John Myhre.)

surance hereunder on buildings (and/or on their contents) in which such breach occurs.

Consequential Damage Exemption Incubator and/or Brooder Clause.

It is understood and agreed that the insurance (if any) under this policy on Eggs and/or Chicks in incubators and/or brooders, does not extend in its application to cover, and this Company shall not be liable for any indirect or consequential loss or damage thereto, including loss or damage caused by change of temperature resulting from, occasioned or caused by the total or partial destruction by fire of the heating or warming apparatus, connections or supply pipes, nor by the interruption of the heating or warming process from any cause.

Lightning Clause.

This policy shall cover any direct loss or damage by lightning (meaning thereby the commonly accepted use of the term lightning and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property, and subject in all other respects to the terms and conditions of this policy; Provided, however, that if there shall be any [69] other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning whether

(Testimony of John Myhre.)

such other insurance be against direct loss by lightning or not.

Electrical Exemption Clause.

If dynamos, wiring, lamps, motors, switches or other electrical appliances or devices are insured by this policy, this insurance shall not cover any immediate loss or damage to dynamos, exciters, lamps, motors, switches, or any other apparatus for generating, utilizing, testing, regulating, or distributing electricity, caused directly by electric currents therein whether artificial or natural, including lightning.

There was attached to and made a part of said policy of insurance Standard Forms Bureau Form 391, called an owner's occupancy warranty, which was and is in the words and figures following:

Standard Forms Bureau Form 391 (May 1929)
Owner's Occupancy Warranty
(Farm Dwellings and Contents)
Commencement of Policy
8-10-35
Expiration of Policy
8-10-38

Subject to the conditions of this policy regarding vacancy and/or non-occupancy, it is warranted by the insured that the dwelling(s) described under Item(s) No.(s) first will at

(Testimony of John Myhre.)

all times be occupied by the unconditional and sole owner of the within described land, or by immediate members of said owner's family or by a salaried employee of said owner. A breach of this warranty suspends this insurance during such breach. It is understood that if with the written consent of this Company said owner has entered into a contract of sale of the within described property, the provisions of this warranty shall be extended to include such contract purchaser, or such contract purchaser's immediate family or salaried employee.

Attached to Policy No. 28222 of the Fidelity and Guaranty Fire Corporation.
Issued to William E. Bilquist
Agency at Port Orchard, Washington.
Dated August 10, 1935.

F. E. LANGER
Agent

There was attached to said policy and made a part thereof Standard Forms Bureau Form 371, commonly called a mortgage clause with full contribution, dated August 10, 1935, providing that subject to the terms, covenants and conditions therein set forth, loss or damage, if any, under such policy, on buildings only, should be payable as follows: [70]

Firstly, to Kitsap County Bank, first mortgagee, as interest may appear, whose mail address is Port Orchard, Washington.

(Testimony of John Myhre.)

> Secondly, if any balance remains, to Clarence Jones, as second mortgagee, as interest may appear, whose mail address is Manchester, Washington.

There was attached to said policy, and made a part thereof, Standard Forms Bureau Form 371, commonly called a mortgage clause with full contribution and described and marked thereon as amended form, dated November 29, 1935, providing that subject to its terms, covenants and conditions therein set forth, loss or damage, if any, under such policy, on buildings only, should be payable as follows:

> Firstly and secondly as in the first original clause aforesaid provided, and: thirdly, if any balance then remain, to John and Signe Myhre as third mortgagees as their interest may appear.

Both of said mortgage clauses were subject to identical covenants and conditions set forth on the reverse side of the rider and made a part thereof, relating to the rights and duties of mortgages concerning the payment of premiums, notification of the company in case of foreclosure, or increased hazard; cancellation of the policy, rendering proof of loss, appraisal, other insurance, subrogation of the company to rights of mortgagee upon payment of loss.

(Testimony of John Myhre.)

The mortgagees, not being party to this action, none of such covenants and conditions are in any way applicable to any issue or question arising upon the trial of this cause, nor upon this appeal.

Plaintiffs' Exhibit No. 2, offered on behalf of the plaintiffs, was admitted.

PLAINTIFFS' EXHIBIT 2

consisted of a written draft, without date, for the sum of seventy-seven dollars drawn on John Myhre of Port Orchard by the Kitsap County Bank of Port Orchard, bearing [71] on its face the words "Bilquist Fire Ins." and "On this date you were advised that your account in this bank was charged the amount of the unpaid items described hereon."

Plaintiffs' Exhibit No. 3, offered on behalf of the plaintiffs, was admitted.

PLAINTIFFS' EXHIBIT 3

was the conditional sales contract with the Mitchell Sales Corporation under which the plaintiffs purchased certain furniture and equipment placed in the insured building and destroyed by the fire. It appeared on the trial that the amount due under such conditional sales contract had been fully paid prior to the date of the loss and the defendant waived any defense arising out of the ownership of such property under such conditional sales contract, and the terms of such exhibit thereby became and were and are immaterial, and not relevant, to

(Testimony of John Myhre.)

any of the issues or questions involved in the trial of the cause or upon this appeal.

At this point the defendant interposed an objection to the testimony given by the witness as to what was said by Langer and what was not said by Langer and as to what was said by Myhre and by Bilquist, as inadmissible for any purpose except that of varying the terms of the written contract of insurance by parole evidence; and moved to strike the same. The court overruled the objection, and reserved consideration of the motion to strike.

Thereupon it was openly stated and agreed by counsel that the testimony should go in subject to the defendant's objection.

"The building and furniture were totally destroyed by fire on the 12th day of September, 1936. I learned of it on the morning of that day. I went down and stayed until Langer came. He said he would call them right away. I did not see any adjuster until the 60 days had gone by. I had conversations with Langer from time to time. All I could get from him was that he expected a [72] check at any time. He said something to the effect that he would take care of it, and I relied on that.

Langer and I went to McCollister & Campbell's office in Seattle and found out that they were not going to pay the policy. They told me they would not pay because it was made out as a dwelling house instead of an inn; that I was supposed to be half owner and was in as a mortgagee. That is the first

(Testimony of John Myhre.)

I knew that the policy was not going to be paid. I think this was more than sixty days after the fire. I then employed Mr. Greenwood and instituted this suit.

After we bought, Moen got a license to operate a beer and wine concession in the place. It was carried on in a corner of the building in a room about 12 x 14, but wines and beer were served in the dining room. We put in beer taps, coil boxes, glasses, 6 chairs, and a small back bar with a mirror. There was no stove or electrical apparatus and no oil or combustibles kept there in connection with that business.

Plaintiffs' Exhibit 4 is a form for our loss of the furniture and equipment destroyed by fire. The loss totals $1,871.00, figured at second-hand prices.

Plaintiffs' Exhibit No. 4 offered on behalf of the plaintiffs and admitted.

PLAINTIFFS' EXHIBIT 4

is a list of hotel upstairs, bath room, rest room, kitchen, lobby, dining room and bar room furniture and equipment destroyed by the fire, with the values placed thereon by the plaintiffs, aggregating the sum of $1,871.00, and filed by the plaintiffs as their proof of loss. [73]

When we took the insurance we signed no application before Langer.

At the close of the direct testimony of the witness John Myhre, the defendant renewed its motion

(Testimony of John Myhre.)

to strike the evidence of John Myhre as being an attempt to vary the terms of the policy by parole evidence, and as an attempt to show a waiver of the terms, stipulations and conditions of the policy of insurance contrary to the provisions of the policy that its terms and stipulations and conditions could be waived only by agreement endorsed upon or added to the policy.

The motion was denied by the court without prejudice to the right of the defendant to renew it at other stages of the trial.

The defendant seasonably asked and was allowed an exception.

Upon

Cross Examination

the witness John Myhre further testified as follows:

I have lived in Port Orchard and been in the restaurant business since the first part of 1931. I started handling beer in 1932 or 1933. The destroyed property and my place of business in Port Orchard are in the same county, about 6 miles apart. I knew Bilquist in North Dakota. He was from the town of Hanks. When I knew him he was a farmer; later he bought and ran a hotel. Not long after he came to Port Orchard we began to negotiate for the purchase of the property. This particular property was owned by a man named Haas, a real estate operator near my place of business. Mrs. Bilquist spoke to Haas about the place and then spoke to me about it. They told me it was at Manchester. I

(Testimony of John Myhre.)

had not paid any particular attention to the place before.

Mr. and Mrs. Bilquist and my wife and I looked at it. A Mrs. Gunther was living there. We asked her about the place [74] and what it had been used for and how it had been conducted. We looked at the furniture, which was in very poor condition. Not very long after we began negotiations with Haas for the purchase of the property. The four of us agreed with Haas on the terms, and bought the place together. We were to pay so much down and so much a month. We borrowed $1500.00 from Langer in the first place. Our purchase price was $3500.00. We paid down $1000.00 in cash. Mr. Jones had a mortgage on the property for $1000.00. We gave Langer a mortgage for $1500.00. I had been a customer of Langer's bank since 1931. I arranged the credit with him, giving a note signed by myself and wife and Bilquist and wife, with a mortgage on the property. This was recorded just after the deed from Haas to us. Langer attended to it. Mrs. Applegate represented us in the transaction. I have borrowed money before, but I think this is the first time I ever gave a mortgage. I don't think I read the mortgage—I left that all to Langer. I imagine that it was Langer who had me and my wife sign the mortgage. The mortgage was delivered to him. He had the deed and the mortgage. We signed the note and mortgage in his bank. I expected him to keep the policy, and he did. I was in his bank nearly

(Testimony of John Myhre.)

every day. I did not ask him to let me see the policy, but he showed it to me voluntarily. I kept an account with him. I gave no permission to charge the premium to my account. He said nothing about it. He gave me a slip which said it was in payment of the insurance. I first learned that my interest appeared as third mortgagee when Langer and I went to see the insurance company in Seattle after the fire. We bought the property because we thought it was a good investment and a good place for the Bilquists to make a living.

When the deal was consummated Mr. and Mrs. Bilquist went down and took possession. I helped them out, but they practically [75] helped themselves after they got there. They started business immediately. I went down occasionally to see how they were getting along, and they came up occasionally to tell me how they were getting along. We bought some furnishings for the house on the installment plan; they were put into the house and paid for out of the proceeds of the business. Langer wrote two notes, one for $1500.00 and one for $2100.00 or $2250.00, which the four of us signed. I made the arrangment for the credit. We went in and executed the mortgages. He took our acknowledgment. After Bilquist started they started to sell meals and lodgings. Moen got a license for himself to operate a beer saloon on the premises. It was operated from the time he secured the license in

(Testimony of John Myhre.)

April 1936 up to the time of the fire on September 12, 1936. I knew they were selling beer. They paid a fiddler or a man that played the piano and they had dancing there every night. They closed up in the winter of 1935-1936 and went out and went to work over the winter. They were in California. Mrs. Bilquist worked for me in Port Orchard that winter. They did not start fixing up until about two weeks before they got the license in April 1936. The piano player sat in the dining room where they danced. The only change made was to put in two toilets and a bar with room for six stools in front of it. We tried to close at one o'clock. There was an investigation by the State Liquor Board of the beer saloons or beer parlors in Manchester. The Board sat two days. I was there as a spectator. The Board refused to renew any license to sell beer in Manchester. Mr. Greenwood got the policy from Langer about a year ago at the time when he started suit. I told Langer I wanted the names changed so that my name was on the policy. I took it for granted he had changed it. Bilquist was not the sole owner. We put in $600.00 in improvements. Plaintiffs' Exhibit 1 is the policy I am attempting to collect on and the one I refused to pay Langer for. I told him I wanted it changed so my name was on the policy.

(Testimony of John Myhre.)

Upon

Redirect Examination

the witness John Myhre further [76] testified as follows:

When I told Langer I wanted the policy corrected he said, "We will have it changed." This was after he had taken the money out of the bank for the premium. I assumed and relied upon the fact that he had changed it. We put about $800.00 in new furniture.

Upon

Recross Examination

the witness John Myhre further testified as follows:

Practically all the improvements were made before we put in the beer parlor. Less than $200.00 was spent to put in the ice boxes, bars, etc. The toilets cost about $50.00.

MRS. BESSIE BILQUIST,

called and sworn as a witness on behalf of the plaintiffs, upon

Direct Examination

testified as follows:

My name is Bessie Bilquist. I live at Retsil. I have known Mr. and Mrs. Myhre many years. We came to Washington in June 1935 and my husband

(Testimony of Mrs. Bessie Bilquist.)

and I and Mr. and Mrs. Myhre acquired the property known as Manchester Inn. We bought it together equally, including the furniture and equipment. The new equipment we purchased half and half. We paid $3500.00 and put in a lot of new furniture and renovated the whole house by papering, varnishing, fixing the furniture and rugs. We put in new pilings and a porch.

We were all four in the deal, but most of it was left to Myhre and myself. After we took possession of the inn we lived in it. We purchased it for a summer hotel and an inn. Langer came down and looked it over before he made the loan. We told him what we were buying it for. It was a large two story frame building shingled on the outside, fronting on the Bay, with 11 rooms upstairs and 6 downstairs. There is a large dining room, a kitchen and a lobby. At one time one room was used for a bedroom and we transferred it into a sitting room which later became a bar room. It was not over 12x14. When the beer and wine was taken on we [77] renovated it, cleaned it up and put in a little back bar, a counter and 6 stools.

Our main business was serving meals and our beds and over week-end guests. We served banquets. We served 85 Manchester citizens at one time, the Bremerton Teachers' Club with about seventy-five at another, and the ladies' organizations several times in the afternoon.

(Testimony of Mrs. Bessie Bilquist.)

There was no additional heating apparatus or wiring put in when the beer parlor was installed. There was a beer cooler. The place was conducted no differently after that than before. We had a piano before the beer, but did not have the piano player until after. I was there at the time of the fire. It occurred between three and four in the morning. My husband, myself, William Gilbert, the piano player, Lloyd Halsted, Ervin Moen and Jimmie Farrell were all in bed. I discovered the fire. We closed up before one and went to bed about one. I had been asleep and awoke. I heard a sound like rain which I later discovered was burning shingles. I lay there a while and then I was sure I smelled smoke. I got up and opened the hall door. The hall was filled with smoke. I awakened my husband, Gilbert, Joen and Jimmie Farrell. We got out through the back stairs, on the beer parlor side. There was no fire in the beer parlor. It was coming from the opposite side and up through the stairway. The flames were coming from the basement. We were not able to save a thing.

Mr. Myhre and I fixed the values on Plaintiffs' Exhibit 4 at second-hand values. I think that is what they were worth. I went with the adjuster and my husband the next day to look the ruins over. My husband and I left about ten days after for Eastern Washington to pick apples and left the matter in John Myhre's care. The building was a complete loss.

(Testimony of Mrs. Bessie Bilquist.)

Upon

Cross Examination

the witness Bessie Bilquist further [78] testified as follows:

We had conducted a hotel at Hanks, North Dakota, before coming here. When we came we lived at the residence of Mr. and Mrs. Myhre. We had an apartment there. When we reached an agreement with Haas it was agreed that Mr. Bilquist and I should operate the property. Myhre furnished the credit with Langer to make it possible. It was our purpose to make a living by conducting an inn where we would sell meals. We had not thought of selling beer and wine at that time. The place was closed from December 1935 until April 1936. During that time we made our plans to put in a bar and to serve beer and wine. We had Moen secure the license in his own name. Some of the furnishings for the beer parlor were purchased by Moen and my husband. Moen attended the bar and Gilbert played the piano. I was the waiter. I do not know what arrangement my husband had with Moen about the bar. He conducted the bar and the beer and kept track of all that was sold in the bar room. I could not remember how much he received for that. Myhre knew we were conducting a beer saloon. We were open from nine or ten in the morning until one o'clock at night. At times we had big crowds. We let them have a good time. Saturday nights we had crowds big enough to dance. Gilbert was there all

(Testimony of Mrs. Bessie Bilquist.)

the time, and when anybody wanted to dance he would play the piano. We wanted everyone to have a good time; I suppose we wanted a crowd. The fire was on Friday night. We were up until one o'clock. There was a large porch in front of the building that faced the Bay side, and a large space that came off the porch and opened onto the lobby. The stairs went up from the lobby and there was a fireplace in it. That was where people sat the night of the fire.

There was a basement under the whole house, but no furnace. The automobile was kept under the front porch on the Bay side. The building was all frame and the basement was high enough for a man [79] to walk under. We had an electric range there and stoves. From Eastern Washington we went to Lindsay, California. While there someone representing the insurance company called on us and asked us to make a written statement. I read it over when I signed it.

Our guests could amuse themselves by dancing and drinking beer and staying up until one o'clock in the morning. As many as wanted to could come in if the place could conveniently hold them. We usually had a very choice crowd. We invited a few out that were undesirable. Complaint was made by people in the community about being disturbed.

In our early married life my husband and I lived on a farm. We sold the farm and went to Hanks and started in the hotel business. I have been deal-

(Testimony of Mrs. Bessie Bilquist.)

ing with the public for some time and naturally know what a fire insurance policy is. I did not ask Langer to see the policy. I made no effort to see the contents of it, and so far as I know my husband did not. Myhre and I were the only ones who negotiated and attended to this business transaction. If anything had been made we would naturally have divided it.

Myhre put up $250.00 of the purchase money on the property for our benefit under a verbal agreement we had with him. Myhre came down to the inn frequently. He told us he had taken out insurance. At the time of the fire my husband and I occupied rooms on the second floor. J. L. Farrell and William Gilbert, the piano player, and Lloyd Halsted resided with us. Halsted worked at the stone quarry and Irvin Moen was the bar-tender. The fire took place on the Bay side. The lobby and the dining room were all on the Bay side and the piano was in the dining room. People danced on the Bay side. The fire took place on the side where the dance hall and the lobby with the open fireplace was. We used the dining room for dancing. Any time people came in Gilbert played the piano. Sometimes they paid him for playing it. We wanted guests to have a [80] good time. We had the piano player for that purpose. We bought some property from North Dakota. It is still ours.

WILLIAM BILQUIST

one of the plaintiffs, called and sworn as a witness on behalf of the plaintiffs, upon

Direct Examination

testified as follows:

My name is William Bilquist. I am one of the plaintiffs and the husband of Bessie Bilquist. My wife and I operated this building. I made the arrangement with Moen as to the concession for beer and wine. We divided half of the profits of the beer place between the house and him. My wife took care of the dining room and upstairs. My wife and Myhre conducted the transaction for the purchase of the place. I did not take much personal part in it.

I was there when the fire occurred. The place with all the furniture was completely burned. When I got out of the building the flames were pretty well over the whole thing; the front part was all burned up, but the back part was not. The only thing I could say is that it started on the front or Bay side; that is all I know. I am positive that it started on the bottom in the basement, or on the first floor. The beer parlor was on the other corner and there was no fire on that side at the start. In the beer parlor there was only a frigidaire.

(Testimony of William Bilquist.)

Upon

Cross Examination

the witness William Bilquist further testified as follows:

We began serving beer on the premises about April 1, 1936, and were serving beer the night before the fire. We served beer to customers at tables in the dining room, but not on the porch. The fireplace was in the room between the dining room and the lobby and on the Bay side.

I never made any attempt to see the insurance policy. I knew there was a policy taken out because Myhre told me so. That is all I know about it. [81]

My wife made the deal for the $250.00 from Myhre that was used in the purchase of the property. I had an automobile there. Moen, the bar tender, had one. I left my car outside that night. Moen's car was burned up. He came in after I went to bed.

After we had done some decorating, we began to invite people to stay and to serve meals. We were running a summer hotel. We first conceived the idea of putting in a bar room in the spring of 1936. I told Myhre we were going to put it in, but did not tell Langer. Myhre told me he had insurance on the property, but he did not tell me who had written it. There were a few more people there when we had the saloon. We had as big parties before and fed eighty and ninety at one time. We never had that many that ate there at any one time after we

(Testimony of William Bilquist.)

put beer in. I did not make inquiries about the insurance to find out what the rate would be on a hotel, and made no inquiries about the insurance when we put in the beer parlor.

ERVIN MOEN

called and sworn as a witness for the plaintiff, upon

Direct Examination

testified as follows:

My name is Ervin Moen. I am the person who conducted the beer concession. Bilquist put in the fixtures when the bar was built. My arrangement with him was that we were each to take fifty per cent of the profit from the bar room. I was there the night of the fire. The fire originated somewhere in the front part of the building underneath the lower part. The beer parlor was on the northwest corner. The main business conducted in my estimation was meals and rooms. They lived there, too.

Upon

Cross Examination

the witness Ervin Moen further testified as follows:

I was the bar tender. There was enough business to keep me occupied as a bar tender. I left the premises the evening before the fire about seven o'clock in the evening and returned around [82] one-thirty. I had trouble getting the engine to my

(Testimony of Ervin Moen.)

car started and had to be pushed. I went to Port Orchard. When the fire started it went fast and it nearly got us before we could get out. It was an old building. I lived in Port Orchard. I had been in the state about three years. I had not known Bilquist before. I proposed to Bilquist the putting in of the bar. He had found out that he could not take out a license.

FRED VETTERS

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Fred Vetters. I am Chief Deputy Sheriff of Kitsap County, at Port Orchard. I had occasion to go into and observe the Manchester Inn. While beer and wine was served there, I thought it was a very clean-cut place as a beer parlor. I never had any kick on the place individually nor any trouble with rowdyism or drunkenness.

Upon

Cross Examination

the witness Fred Vetters further testified as follows:

I have been Chief Deputy for over two years and a half. I live at Port Orchard, west of the court house. Before I became a Sheriff I followed the business of prospecting in the Stikine River district

(Testimony of Fred Vetters.)

of Alaska. I inspected the inn on Saturday evenings and most of the time on Friday, because we patrol these districts wherever there are any beer parlors or places of amusement such as dance halls. There was no other dance hall there. There was a little beer parlor up on the hill that they tried to dance in and we told them to cut it out. There were three places there that dispensed wine and beer. We would drop in at different times from nine on up to one and stay a little while and leave. We had complaints about the beer parlors in Manchester. The Liquor Board wiped them all out.

Upon

Redirect Examination

the witness Fred Vetters further [83] testified as follows:

I did not have any complaint against this beer parlor.

ALLEN TOTTEN,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Allen Totten. I am in the meat and grocery business at Port Orchard where I have lived about twenty years. I frequently went to the Manchester Inn while it was operated by Mr. and Mrs. Bilquist. I sold them stuff and I used to go

(Testimony of Allen Totten.)
down once in a while and have a glass of beer. Every time I was there it was very quiet.

Upon

Cross Examination

the witness Allen Totten further testified as follows:

My wife did not go along. I was there one Saturday night. I belong to the Fire Department and we entertained the Fire boys there. We were orderly. That is the only time I was ever there when there was a crowd.

OLAF NELSON,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Olaf Nelson. I have lived in Manchester since 1925. I operate a general store there. I am acquainted with the Manchester Inn and frequently visited it while Mr. and Mrs. Bilquist were there; mostly on Saturday nights. I never saw any rowdyism. I never saw trash thrown around; there were plenty of ash trays.

Upon

Cross Examination

the witness Olaf Nelson further testified as follows:

My place is five or six hundred feet from the Man-

(Testimony of Olaf Nelson.)

chester Inn. I went there with friends to relax and dance and drink a little beer and have a little fun. It was rather crowded. Not many people went to the bar. They would bring the beer in pitchers. We could smoke if we wanted to, leave our pitchers and dance and [84] come back and smoke cigarettes and do anything we wanted to within reason to have a good time. From April to September I may have been there a dozen to twenty times. I had patrons along the beach in the summer time. The Manchester Inn was the last one granted a license. It went out after a hearing of two days.

FRANK E. LANGER,

called and sworn as a witness for the plaintiffs, upon

Direct Examination

testified as follows:

My name is Frank E. Langer. I am president of the Kitsap County Bank at Port Orchard. I have been in the banking business all my life and with that bank since 1919.

Since I have been with that bank it has continuously loaned money on real estate. I have been one of its appraisers and I am familiar with the value of property around the south end of Kitsap County. On July 23d, 1935, Haas and I appraised the property known as Manchester Inn. He is a realtor

(Testimony of Frank E. Langer.)

and insurance man and a member of the Board of our bank. I am a licensed insurance agent. The insurance is handled separate from the bank and is my own agency. On August 10th, 1935, I was the agent of the Fidelity and Guaranty Fire Corporation for that district, and was furnished with blanks to transmit to that company in connection with fire insurance. I placed the policy and collected the premium for that company on the policy marked "Plaintiffs' Exhibit 1". I did not secure any written application from Myhre or any of the insured. I was furnished Standard Bureau Form No. 548, which is Plaintiffs' Exhibit No. 5. When I secure the right to write a policy I fill out this form and send it to the company at Seattle, and as a rule they write the policy and send it back and that form becomes a part of the policy. It is sent to Seattle to have the rate fixed, and when it comes back I sign it. That was what I did with this policy. It was sent to McCollister & Campbell in Seattle and I was the only person who signed it other than the facsimile [85] signature of the president and secretary of the company, the home officers of the company. I am the only one signing the policy in Washington. When Myhre and Bilquist first purchased the property, the first loan was $1500.00 for which we took a mortgage signed by Mr. and Mrs. Myhre and Mr. and Mrs. Bilquist. I had the abstract brought down and kept it in my possession. I knew they both had money invested

(Testimony of Frank E. Langer.)

in it. I told Myhre that in case we made the loan we would like to have the insurance. That is customary when making a loan. I made no inquiry of him as to who should be insured. I filled in the form and mailed it to the company in Seattle. They filled in the policy and mailed it back. The bank had the note and mortgage signed by both parties in its possession at that time. I think Mrs. Applegate made out the note and mortgage. I didn't. Myhre came in the bank and asked for the policy and I gave it to him. He said his name did not appear in the policy and that he wanted his name to appear in it. I told him that I would take care of it so his interest and right would be protected. I sent the policy back to the company. I think I instructed the company to put that mortgage clause mentioning Myhre on the policy. Plaintiffs' Exhibit 7 is the first mortgage note, signed by Bessie Bilquist, William Bilquist, John Myhre and Signe Myhre. Plaintiffs' Exhibit No. 5, offered on behalf of the plaintiffs and admitted. Plaintiffs' Exhibit 5 is Standard Forms Bureau Form No. 548, unsigned and with blanks unfilled, and except for want of signature and for want of any filing or entry in the blank spaces thereof, is identical with Standard Forms Bureau Form No. 548, attached to and a part of the policy, Plaintiffs' Exhibit 1. Plaintiffs' Exhibit No. 7, offered in behalf of the plaintiffs and admitted.

(Testimony of Frank E. Langer.)

PLAINTIFFS' EXHIBIT 7

is a promissory note bearing date at Port Orchard, Wash. 11/23/35, for the sum of fifteen hundred dollars, signed by Bessie Bilquist, William E. Bilquist, John Myhre [86] and Signe Myhre, payable to the order of the Kitsap County Bank, at its office at Port Orchard, Washington, two years after date with interest after date at 8 per cent per annum, principal and interest payable monthly $25.00 and interest to March 1, 1936, and $50.00 thereafter.

I am familiar with the value of real estate around south Kitsap County.

On

Examination upon voir dire

by Mr. Groff, he testified as follows:

I am familiar with the property known as the Ballard or Neubling property, having known it for several years. I have been 20 years in the community. I go over there several times a month. There are two ways of arriving at value; what it would sell for and what it would cost to reproduce the building—that is about all. You gather all the information you can of all property that has been sold surrounding that property—if sold within some short time we give it consideration. We make inquiry from a man who does not have to buy and is

(Testimony of Frank E. Langer.)

willing to buy and from a person who does not have to sell but is willing to sell, and that way get market value. This property was last sold to Haas for $2500.00.

Direct Examination.

of the witness F. E. Langer being resumed, he further testified as follows:

In my opinion the reasonable value of the building was $3000.00, and of the land, about $900.00. When I wrote this policy Mr. and Mrs. Bilquist had already moved in. I knew it was an inn and had known it 4 or 5 years. My family and I had Sunday dinner there twice before.

I first learned of the fire from Myhre the same day in the morning. I told him I would write the company, and I did. Mr. Kelly, an adjuster, came over to Port Orchard a day or two later. Myhre came in from time to time. He wanted to know when the claim [87] would be settled. I told him I didn't know, but that I was in direct communication with the company, and as far as I knew, it would be adjusted in time. Myhre and I made a trip to Seattle to find out whether the company would pay it. We went to the office of the United States Fidelity & Guaranty Company and talked with Mr. Edwards. In matters pertaining to my agency I have dealt with him. He said there was some dispute as to whether the fire had been set and he did not think they would pay the claim. One

(Testimony of Frank E. Langer.)
reason was that there had been a beer parlor put in there. He said proof of loss had not been filed within 60 days. Nobody received a form for proof of loss that I know of.

Upon

Cross Examination

the witness F. E. Langer further testified as follows:

I am 48 years old and have been in the banking business since I got through the University in 1914 —first at North Bend, and later at Sunnyside. I studied law at the University. From North Bend I went to Port Orchard. After a year I went to Sunnyside. After about a year I purchased the bank and became manager. At all the banks I have been connected with some person connected with the institution wrote fire insurance. During the 19 years I have been writing fire insurance on all kinds of property. I write some on the business property downtown. I do not write the insurance on Myhre's beer saloon and restaurant.

Business property carries a different rate from a dwelling. The rates are set by the state through the Insurance Department and Rating Bureau. From time to time I have called upon them, or asked through our general agent, to ask what a rate was.

When I get a prospect for insurance I ask him questions and write them down or have him write them down on a blank, and send the information

(Testimony of Frank E. Langer.)

to the general offices which writes the policies, puts in the rate and sends the policy to me, and I sign it, turn it [88] over to the prospect and collect the premium.

Blanks such as defendant's Exhibit "A-1" were furnished me by McCollister & Campbell, the general agents. I think I sent that writing to McCollister & Campbell. It was my application for the policy in question."

Defendant's Exhibit "A-1", offered on behalf of the defendant, admitted.

DEFENDANT'S EXHIBIT "A-1"

is Standard Forms Bureau Form No. 528, with the signature of F. E. Langer in typewriting appended thereto, and, except as to the aforesaid signature being typewritten, it is as to form and as to the entries and filling of the blank spaces thereof identical with Standard Forms Bureau Form No. 528 attached to and made a part of the policy, Plaintiffs' Exhibit 1.

At the time I knew that Myhre claimed to have an interest in the property, I do not know why I did not put his name in the application. I always put in the person who has an insurable interest. I noticed that Myhre had put money into the purchase of the business. In what portion, I didn't know and still don't know. I knew that Bil-

(Testimony of Frank E. Langer.)

quist had an interest in the building and that he was going to live there, and make that his home. I presume that is the reason. Myhre said he wanted his name to appear in the policy, so I figured that as long as he had an interest I would put it in as third mortgagee. There was a second mortgage to Jones, and the bank had the first mortgage. I figured I would protect him by putting in him as third mortgagee.

When the policy was first written Myhre and Bilquist had a loan of $1500.00 and it was the policy of the bank to keep the insurance with the mortgage and the abstract. Neither Myhre nor Bilquist asked for the policy or examined it until after the first mortgage had been reduced by about a thousand dollars; then they wanted me to take up the second mortgage, which I did. Then we [89] made a new mortgage and it was at that time Myhre came in and asked to see the policy, and he examined it, and said his name did not appear in the policy, and as he was a part owner in the business he wanted his name to appear in the policy.

I misrepresented the ownership of the property when I made the application that Bilquist was the owner. I am familiar with the conditions of the policy. I have made no endorsement on the policy that waives any of its provisions.

Myhre has been a customer of the bank for a considerable time. His credit is good and we have made him accommodations on his note from time to time. Bilquist I did not know. His interest was

(Testimony of Frank E. Langer.)

primarily brought to my attention by the interest of Myhre.

I have been there 20 years and the inn was in Manchester when I came. It is about a block from the highway. There was a sign on the building and a big sign on the county road that pointed to Manchester Inn before Bilquist came there. I was in the property several times before he bought it. I would say that the building was a least twenty-five or thirty years old. It is a frame building with a long porch over the Bay side. I went down there with Haas, who is in the real estate business. We went through the building and examined it. It was old, but in fairly good condition—a two story building with 11 rooms upstairs, a nice big dining room, and a kitchen and lobby below. It was on a foundation of cedar posts.

I often appraise buildings. We loan on a mortgage from fifty to sixty-five per cent. The first mortgage was $1500.00. I think it was a reasonable loan on that property. I figured the waterfront at ten dollars per front foot, which would make the land worth $1000.00. The Puget Sound Timber Company sold all their waterfront there for ten dollars a front foot. They left the timber on. The property we were speaking of has been improved many years, [90] and a little creek comes through it into the bay.

In July 1935 I had conversation with Myhre about assisting Bilquist to locate in this community. Myhre came in to see me about it. I knew both

(Testimony of Frank E. Langer.)

Mr. and Mrs. Ballard. On the strength of Myhre's credit, I loaned these people $1500.00. Mrs. Applegate took the abstract and had the papers signed and took the papers over to the abstractor and he brought it down. I didn't handle the abstract myself. Mrs. Applegate was a lawyer. She put an insurance policy on the improvements and furniture. I had her cancel it when I wrote the insurance.

On July 23d I had Mr. and Mrs. Bilquist and Mr. and Mrs. Myhre execute the note for $1500.00 with 8% interest secured by mortgage on the premises. From time to time payments were made by Myhre. Later they interested me in making an advance sufficient to pay Jones and put all the indebtedness with the bank. I own control of the bank. I have enough stock to control the Board of Directors.

The money from insurance goes to me personally. As principal stockholder of the bank, I had an exceptional interest in the mortgage. I do not know any reason why the policy wasn't put in both names. I have written insurance for twenty years. Mrs. Applegate wrote the first mortgage. I wrote the second. We keep the abstract and the fire insurance policy until the mortgage is paid. Anything about the policy that Myhre, or anyone else, wanted explained, I explained as far as I could. I was not there after the place was turned into a beer parlor. I had no knowledge of how they conducted their business. I never permitted them, orally or otherwise, to open a beer parlor on the premises.

(Testimony of Frank E. Langer.)

Upon

Redirect Examination

the witness F. E. Langer further testified as follows:

Plaintiffs' Exhibit 6 is the second note I took at the time [91] I took up the second mortgage and put it all in one, and this time we advanced $2150.00.

Plaintiffs' Exhibit No. 6, offered in behalf of the plaintiffs, was received.

PLAINTIFFS' EXHIBIT 6

is a promissory note bearing date Port Orchard, Washington, July 28, 1936, for the sum of twenty-one hundred and fifty and no/100 dollars, signed by Bessie Bilquist, William Bilquist, John Myhre and Signe Myhre, payable to the order of the Kitsap County Bank at its office in Port Orchard, Washington, on or before four years after date, with interest after date at the rate of eight per cent per annum, principal and interest payable $35.00 per month and interest for first year and $50.00 per month and interest thereafter.

I am still agent for McCollister & Campbell, the same as I have always been.

Upon

Recross Examination,

the witness F. E. Langer further testified as follows:

I knew that this place was built for an inn and

(Testimony of Frank E. Langer.)

was used as an inn and that Bilquist was going to engage in the same line of business, and I suppose I knew it was not going to be used exclusively as a dwelling.

WILLIAM GILBERT,

called and sworn as a witness on behalf of the plaintiffs, upon direct examination testified as follows:

The fire originated on the east end of the building on the opposite side from the beer parlor, but at the other end.

Upon

Cross Examination,

the witness William Gilbert further testified as follows:

The building was not long in burning.

JOSEPH HAAS,

called and sworn as a witness for the plaintiffs, upon direct examination testified as follows:

My name is Joseph Haas. I have been in the real estate [92] business 8 years—five years at Port Orchard—and during that time I have dealt in beach property and real estate such as exists in the south end of Kitsap County. I sold the Manchester Inn to these parties and I am acquainted with the value of property. On July 25, 1935, I valued the building

(Testimony of Joseph Haas.)
at approximately $3000.00 and the land at between $840.00 and $1000.00.

Upon

Cross Examination

the witness Joseph Haas further testified as follows:

I write fire insurance. We insure only the building; the front foot worth is immaterial. I am familiar with the Rating Bureau. They make the rates for all the companies and their agents.

Witness shown defendant's Exhibit "A-2", states that it is the fire insurance rates.

"I paid $2500.00 for the building and land. Mr. Ballard, who owned the property, was sick and there was a contract foreclosure threatened on it. They had no means, and he had to take what was offered or lose the whole thing. I bought it for fifty cents on the dollar, cash. Neubling had the title. I received the deed from Neubling, who lived in New York.

If a building is exposed to the sea, as this one was, when it will wear out depends upon how the building is taken care of. The place was painted and in condition, but the exterior was weatherbeaten. I loan money on mortgages. I would have loaned $2500.00 on the land and building at 8 per cent. In determining the value of this property, I took into consideration that it had 11 rooms upstairs, a large dining room, a bed room, a lobby, a fireplace, kitchen, and water system. A new building would cost three times as much. The building was up on

(Testimony of Joseph Haas.)

blocks. There was no way of heating the upstairs bed rooms unless a furnace were put in. There was a bathroom and a toilet room upstairs and running water [93] in them. We call anything with a bathroom and running water in the kitchen modern. I would have recommended to any investor that he could safely have paid $3000.00 for the building. I just sold a $6000.00 house not far from there. There were lots of buildings around the bay used as dwellings that would stand $2500.00 insurance.

Thereupon the plaintiffs rested.

The plaintiffs having rested, the defendant renewed its previous motion to strike all testimony in behalf of the plaintiffs that in any way tends to modify or waive any provision of the insurance policy, the basis of this action, as an attempt to vary by parole evidence the terms of a written contract.

The defendant's said motion was denied. The defendant seasonably asked and was allowed an exception thereto. The plaintiffs having rested, the defendant moved that the court take the case from the further consideration of the jury and direct a verdict in favor of the defendant.

The defendant's said motion was denied. The defendant seasonably asked and was allowed an exception thereto.

Thereupon

LEONARD L. EDWARDS,

called and sworn as a witness for the defendant, testified as follows:

My name is Leonard L. Edwards. I am associated with the firm of McCollister & Campbell and I have charge of fire insurance. Witness shown defendant's Exhibit "A-1", said that it was the application received from our agent at Port Orchard for the execution of the policy. This application is the necessary description of the location of the property, the kind of property, the amount of insurance desired, the amount of indebtedness on it, the information necessary to arrive at a proper rate. This application was received by us.

Shown Plaintiffs' Exhibit No. 1, the witness said that it [94] was the policy issued in connection with that application.

The policy is known as the New York Standard Form; it is universally used throughout the United States. The form of policy has been used in this state since 1911. The signatures on the policy are of the principal officers of the company in Baltimore. The soliciting agent signs the policy because it gives him prestige to have his signature on the policy. He represents the company within his limitations and is the man that secures the business. The policy was drawn in our office under the application received from Langer at Port Orchard.

Shown defendant's Exhibit "A-2", the witness said, "It is a published rate sheet issued by the

(Testimony of Leonard L. Edwards.)

Washington Surveying and Rating Bureau, a bureau under the supervision of the Insurance Department of the State of Washington, and shows the individual annual rate to be on each risk located in Manchester other than dwellings. The application indicates a dwelling occupied by the owner with shingle roof, electric lights, without foundations, with a brick chimney; all its rooms plastered, and that it had not been painted within five years; that the annual rate was $1.10, the 3-year rate $1.92. The premium on the 3-year rating amounted to $77.00. Had the status of the property been truthfully stated in the policy, the applicable rate on this particular property would have been $3.46 for a year.

Defendant's Exhibit "A-2", offered in behalf of the defendant, and admitted.

DEFENDANT'S EXHIBIT "A-2",

eliminating reference to certain properties not covered by the policy of insurance and otherwise owned and located, reads as follows:

Kitsap County, Washington Manchester Page 1

Line	Location	Class	Risk	Bldg.	Cont's.
28	Sheet 1, Block 201		2 Sty Fr.		
29	800 ft S. of wharf	D	(Manchester Hotel	3.46	3.46

[95]

We first learned that a misrepresentation had been made to us as to the ownership and classification of this risk when we sent our adjuster there for a preliminary investigation of the loss. This is

(Testimony of Leonard L. Edwards.)

a custom common to all insurance companies and done to protect both the company and the policy holder. Information was brought back to us by the adjuster that Bilquist was not the sole owner; that the property was not a dwelling, but was a beer parlor, hotel and dance hall.

Our evidence disclosed that it never was used as a dwelling after the date of its insurance; that the beer parlor was installed approximately April 1, 1936, and was in full force at the time of the loss.

We did not give Langer authority to write policies. We did not provide Langer with rate sheets. Every registered agent has one.

Upon

Cross Examination

the witness Leonard L. Edwards further testified as follows:

The witness' attention was addressed to Defendant's Exhibit "A-1", and he said:

These forms are supplied by what we call the Standard Forms Bureau. It is what we term an unprotected dwelling form. We start with a basic rate and give certain credit for structural improvements, and so forth. It becomes a warranty on the policy based on that statement and a part of the policy. That is why that form is used.

The agent at Port Orchard is supplied with rates for Port Orchard. As to Manchester, I do not know. He would be supplied if he requested them. In a

(Testimony of Leonard L. Edwards.)
dwelling risk of this class there isn't any special published rate, and the rate is applied from the general tariff. When an application comes in for an ordinary dwelling we would not resort to the survey of the lot described to see what kind of a building was on it. If the application had come in [96] showing it as the Manchester Hotel, the rate as shown by the rate sheet would have applied. When I receive a dwelling house application I apply the dwelling house tariff. Langer also had standard forms for business property. We got our report from the adjuster right away after the loss occurred and determined that the policy should not be paid.

Upon

Redirect Examination

the witness Leonard L. Edwards further testified as follows:

I communicated the information to Myhre that we were not going to pay the policy, before the 60-day period had elapsed. Langer is a responsible citizen of Port Orchard and has been an agent of our office for sixteen years. When we receive an application from any agent directing us to prepare a policy, we prepare it in accordance with those directions. The instructions that Langer asked us to prepare on are contained in the application, and there is no difference between those instructions and this policy as prepared. The application is made a part and parcel of the policy and was a part of the policy when it was sent to Langer. I have

(Testimony of Leonard L. Edwards.)
been writing fire insurance policies for twenty-two years. The installation of a bar room and a dance hall and the bringing in of an outsider as an associate in the conduct of the bar room increases the risk.

BURT ROGERS,

called and sworn as a witness for the defendant, upon direct examination testified as folllows:

My name is Burt Rogers. I came to Manchester in 1907 and have lived there ever since. I own quite a little property in that vicinity. I reside a short distance from the place that was destroyed. I have known the Manchester Inn ever since it was built. I sold the property to the original purchaser. I sold two lots for one thousand dollars. Mr. Neubling constructed a club or hotel there that was called and advertised as the Manchester Inn. That [97] was the building that stood there before the fire. Neubling and his wife and boy operated it for a good many years; then he sold to Mr. and Mrs. Ballard, who operated it a number of years as an inn. Mrs. Ballard died some years ago, and after that Mr. Ballard and his sister-in-law operated it for a little while.

For a couple of years before it was sold to Haas there was somebody on the property, but it was not run at all. From the time the building was built it was shingled a couple of times. Outside of that, I

(Testimony of Burt Rogers.)

do not know of any repairs made on the property. I testified at a hearing before Judge Sutton in Port Orchard on the value of this building. I placed it at a thousand dollars. It is practically of the same value now.

Upon

Cross Examination,

the witness Burt Rogers further testified as follows:

I fixed the value of this building at one thousand dollars when the Ballard estate was settled up before these people bought it. After they went in I never saw it except on the outside. If they put anything on the outside, I never saw it. If they put in $700.00 in improvements, that would increase the value accordingly. At the time I appraised it, it was practically vacant and inoperative for any purpose. I was told by proper authorities to appraise it at what I thought it was actually worth and would bring at a sale. The building cost $2500.00 in 1909; carpenter labor and lumber was very cheap then. The lumber was brought from Seattle. I know it would cost a great deal more to build it now—probably twice as much. I appraised it in 1934.

Upon

Redirect Examination,

the witness Burt Rogers further testified as follows:

When I testified before Judge Sutton, the valuation was tried to be raised.

(Testimony of Burt Rogers.)

Upon

Recross Examination,

the witness Burt Rogers further [98] testified as follows:

The complaint of exposure at the inn was that a couple came out of the hotel, the man was in a bathing suit, and after he was outside he indecently exposed himself in front of the hotel.

SAM H. DENNISON,

called and sworn as a witness for the defendant, upon direct examination testified as follows:

My name is Sam H. Dennison. I am 46 years old. I reside a short distance from where the inn was located in Manchester. I have lived in that neighborhood off and on since 1900. For a short time during the war I worked in the ship yards at Olympia, and then for about three years I was in the building and contracting business in Seattle. My business was formerly, for about 8 years, contracting and building. I am in the poultry business now. I built six or eight residences in Manchester before the war. I am familiar with the property known as Manchester Inn. I was there to two dinners while Bilquist conducted it, but before the beer parlor was installed, at a benefit dinner for the Community Club. I have been around and by the hotel since the beer parlor and dance hall was opened, but never in it.

(Testimony of Sam H. Dennison.)

I was familiar with the hotel when built. It was constructed about as cheaply as it could be built at that time just to make an inn for a summer proposition. They made their money from people coming there in the summer to board and room. From the time it was constructed to the time it was destroyed by fire there was very little difference in the outside appearance, except that the Bilquists improved the front porch. That was about all they did to the outside.

They built a small garage behind the hotel. Cars were parked around and under the hotel. There was room for two under there close to the front porch. The side of the wall was boarded up to skirt the basement; there were posts in between, and they ran [99] the cars in between the posts. By the wall, I mean the wooden boards; they made a door out of these. The place underneath the porch was open so people could get in there. From my consideration of the depreciation of the building, I would say a thousand dollars would be a good appraisal on the house. I would not want to buy it for that. I was present at the hearing the State Board had. This was one of the institutions that was under question by the Board.

Upon

Cross Examination,

the witness Sam H. Dennison further testified as follows:

(Testimony of Sam H. Dennison.)

I testified against all of them. I have not been antagonistic against these people. I am against liquor, but if the thing is run right I would not say a word.

ALLAN V. KELLY,

called and sworn as a witness for the defendant, upon

Direct Examination

testified as follows:

My name is Allan V. Kelly. I reside in Seattle, and I have been a fire insurance adjuster and appraiser for the past ten or fifteen years. Appraisals mean appraising real and personal property for valuations and insurance purposes. I am the Allan V. Kelly mentioned by Mr. Greenwood as the man who appeared upon the scene after the fire. I interviewed some of the people in the community. I gave no indication to them what my report would be.

I have had sixteen years' experience in appraising property. I started work for mortgage companies that took in real property and buildings. I have had experience in appraising unprotected property or property out in small villages and towns. I have appraised many individual buildings, dwellings and school houses. The depreciation in such a house depends upon the foundation, mainly, and the general upkeep. It runs from three to four per cent per year until it has depreciated at least

(Testimony of Allan V. Kelly.)

seventy per cent. At that time it would be habitable, but the value would be cut [100] down.

I would say it would be hard to figure the value of the building in September 1936 up to one thousand dollars. In my 16 years as an insurance adjuster I have had a great deal of experience in investigating fires and the increase or decrease in risk. Assuming that the hotel under discussion had been conducted as a seasonal hotel for guests, or an inn where meals and lodgings were furnished during the summer of 1935, and in the spring of 1936, a ballroom, a piano player, and a bar were placed in the property, I would say that it would increase the hazard considerably.

I am an independent adjuster with my own office and office force. I adjust for any company that will employ me. I have no connection with McCollister & Campbell except when called to make an adjustment. It is a part of my preliminary survey to learn whether the right rate has been charged. Circumstances change rates.

Shown defendant's Exhibit "A-2", the witness stated that it was a rate sheet sent out by the Washington Surveying and Rating Bureau, setting out rates on certain property in the Manchester section.

An unprotected dwelling located as this building would have a basic rate of $1.75 per year, subject to a thirty per cent deviation. The roadhouse, dance hall and beer parlor rates are rated as one and combined, usually $5.00 a year, subject to a thirty per

(Testimony of Allan V. Kelly.)

cent deviation. An unprotected dwelling can be written for three years for two and a half annual premiums, while a beer parlor can only be written on an annual basis. The true rate on this risk, had it been properly and correctly described, would have been a basic rate of five dollars per hundred for a year, subject to a thirty per cent deviation. There would also have been a charge for automobiles that were kept under the front porch. That probably [101] would have been as much as fifty cents per hundred per year; then there would also have been a charge for chimney on brackets and other points that I don't know about in that building; or there would have been a credit for electric lights. There would have been no credit for a foundation, because of being on posts. The exhibit as to this particular property shows a survey made July 30, 1936, and a rate of $3.46. This is the rate as a hotel and not a beer parlor. The rate would not be less than $3.46.

Upon

Cross Examination,

the witness Allan V. Kelly further testified as follows:

I went over the day of the fire. I talked to Mr. and Mrs. Bilquist, but not to Myhre or Langer. It was about a week after that I went to the bank. I did not tell him I was advising the company not to pay the loss. My employment is entirely by insurance companies. I never saw the building myself. If $700.00 were put into improvements in the in-

(Testimony of Allan V. Kelly.)
terior, that would not be added to my valuation; it is not figured that way. It is a matter of general upkeep that goes along; otherwise your depreciation would be much heavier than three or four per cent. If the improvements had been there, I would not say what they would be worth, but it would be worth less than the cost.

Upon

Redirect Examination,

the witness Allan V. Kelly further testified as follows:

The improvements added some value to the property.

LEONARD L. EDWARDS,

recalled as a witness for the defendant, upon

Direct Examination

further testified as follows:

The witness shown defendant's Exhibit "A-3", stated that it was duplicate copy of the last rating sheet showing the rate on the Manchester Inn, which was made on March 29, 1934, when it was rated as a hotel and lodging house. This is an exact copy of the record of the Rating Bureau secured from the Bureau. It was in effect on [102] August 10, 1935. I got it this morning. I could always have gone and gotten it. There has been no rating since.

(Testimony of Leonard L. Edwards.)

Defendant's Exhibit "A-3" offered on behalf of the defendant and received.

DEFENDANT'S EXHIBIT "A-3"

is a copy from the records of the Rating Bureau of its last survey of the property known as Manchester Inn, and reads as follows:

GENERAL BASIC SCHEDULE

SHEET. I. 800 ft. South of Dock. Block 201.			
MAP. On Puget Sound.			
TOWN. Manchester.			
TOWN CLASS. IoTh.			
BUILDING NAME. Manchester Inn.			
INSPECTED BY. J. A. Sodeberg.			
MEMORANDA. Date 3/29/34			
HEIGHT. 2 and B.	Charges	.02	
AREA. 32x59 plus 35x6 2098 ft.			
WALL. Frame.		1.00	
FOUNDATIONS. Enclosed.		.20	
ROOF SURFACING. Shingle.		.20	
ROOF SPACE. Yes.		.02	
COMBUSTIBLE CONSTRUCTION.			
100% Gross Charge .80. Net charge .80			
TOTAL NET CHARGE.			.80
STAIRS OPEN. Story 1-2 Charge .05			
" O/S to basement S & B			
INTERIOR FINISH. L. & P. Total charges			.05
CHIMNEYS. B.C.B.			.05
OCCUPANCY			1.30
TOTAL STRUCTURE AND OCCUPANCY CHARGES			3.49
PROTECTIVE FEATURES.			
FIRST AID APPLIANCES (I) N.S 1½ Gr. C.T.C.			
DIVERGENCY CHARGE.			.35
			3.84

(Testimony of Leonard L. Edwards.)

CONSTRUCTION GRADE C-3
COMBINATION WALLS 100% Div. factor .85
NET UNEXPOSED BUILDING RATE 3.26
EXPOSURE TABLE.
TOTAL COLUMN I CHARGE .70
MULTIPLY BY .85
NET EXPOSURE BASE .59
NET UNEXPOSED BUILDING RATE 3.26
CONTENTS RATIO .80
CONTENTS RATES SUSC. C. SUSC. CHARGE .30
GROSS FLAT RATE 3.46
OCCUPANCY TABLE. Susc. Class C Manchester Inn. C-3
Loca D. Column I, 110
Column 2 10
In use four months of the year. 10 Guest rooms.
Fireplace heat in lobby.
Cooking on coal range .10
Class J. load A/C Seasonal resort.
Total charges Column I 1.20
Highest charge Column 2 .10

[103]

I know why the exhibit is dated on the top of the sheet. On lines 8 and 9, the buildings were removed, effective 6/30/36. They republished the whole sheet. Lines 8 and 9 refer to a garage and automobile station at Manchester. Any time any of these are changed they republish this sheet, and so it was republished last July 30, 1936, although none of these other risks might have been affected for nine or ten years.

Upon

Cross Examination

the witness Leonard L. Edwards further testified as follows:

The Rating Bureau does not keep the rating sheet up to date; but it will make a new rate at any time,

(Testimony of Leonard L. Edwards.)
upon application by anyone interested. The Rating Bureau is owned by an independent company and is maintained by the State of Washington through contributions from all insurance companies.

Thereupon the defendant rested.

Thereupon the plaintiffs rested.

The foregoing is a full, true and complete statement, in narrative form, of all evidence offered and received upon the trial of the above entitled cause and of all exhibits received and admitted in the trial of said cause.

Upon the close of all the evidence, the defendant renewed its motion made at the close of the plaintiffs' testimony to strike the evidence tending to vary the contract of the policy by parole evidence, and moved the court to strike from the record all testimony adduced by or on behalf of the plaintiffs in any way tending to alter or modify by parole testimony the policy of insurance upon which this action is based.

The motion being by the court denied, the defendant seasonably asked and was allowed an exception.

Thereupon the defendant, at the close of all the evidence, renewed its motion for a directed verdict and challenged the legal [104] sufficiency of the evidence to sustain a verdict for the plaintiffs and

moved that the court direct the jury to return a verdict for the defendant.

The motion was denied, and the defendant seasonably asked and was allowed an exception thereto.

Before submitting the case to the jury, the court said: "I think that upon the status of the authorities that the court ought to resolve whatever doubt there is on the subject in such a way that the proceedings will result and end up in such shape so that whatever view the appellate court might have on it could be eventuated without a new trial. Whatever doubts I have in mind should be reserved to the conclusion of the trial so that the matter can be in such shape that the ruling of the appellate court will leave nothing to be done except to enter judgment to whichever party the appellate court thinks ought to have it," and submitted the action to the jury subject to a later determination of the legal questions raised by the defendant's motion for a directed verdict.

The cause being submitted to the jury, reserving all questions of law arising under defendant's motion for a directed verdict, the jury on the 1st day of February, 1938, returned into court their verdict for the plaintiffs to recover of the defendant the sum of four thousand dollars. [105]

On the 5th day of February, 1938, the defendant served upon counsel for plaintiffs, and on the 7th day of February, 1938, filed with the clerk its motion that the court enter a judgment for the de-

fendant notwithstanding the verdict of the jury, because, under the terms of the policy of insurance upon which recovery was sought, the knowledge of the agent as shown by the evidence was not sufficient to justify a recovery for a loss by fire where the building was used as an inn or hotel, nor for other than dwelling house purposes only, and no issue of fact existed material to the alleged right of the plaintiff to recover, necessary or proper to be submitted to a jury.

The defendant's motion for a judgment notwithstanding the verdict of the jury coming on for hearing and being argued by counsel, it was by the court denied.

The defendant seasonably asked and was allowed an exception to the order of the court denying such motion, upon the following grounds:

1. Because it appears by the uncontradicted evidence that at the time of the loss for which the plaintiffs seek recovery under the policy sued upon, the insured real property was not being used only for dwelling house purposes, nor was the insured property located in a dwelling house building.

2. Because it appears by the uncontradicted evidence that subsequent to the issuing of the policy of insurance upon which the plaintiffs sue, the hazard of the insurance was increased with the consent and under the control of [120] the insured through the use of the insured premises as a place for the sale of beer and

wine to the public and as a place of public dancing, and that by reason thereof the policy became void.

3. Because it appears that at the time of the issuing of the policy of insurance on which plaintiffs sue, and at the time of the loss, the interest of the insured William E. Bilquist in the insured property was other than that of sole and unconditional ownership, and that by reason thereof the policy was void.

Upon denying the defendant's motion for a judgment notwithstanding the verdict, and in the alternative for a new trial, the court prepared and filed its written memorandum decision, which was and is in the words and figures following, omitting the caption:

At the time this case was submitted to the jury it had not been made entirely clear to this court what effect our state court decisions have upon the issues here, but in view of the last paragraph of the court's opinion in the case of Penman v. St. Paul Fire & Marine Insurance Co., 216 U. S. 311, at page 322, which appears to have left that question open, and in view of the decision of our State Supreme Court in Harper v. Firemen's Fund Insurance Co., 154 Wash. 77, holding the insurer liable upon facts very similar to those here, I submitted this case to the jury, which found for the insured.

Upon the argument of the motions for judgment n. o. v. or for a new trial, the parties seemed to

agree that the decisions of the federal courts, if applicable, controlled the determination of the issues here to the exclusion of our state court decisions. On these motions the first inquiry then is: Are there any controlling federal court cases?

The insurer contends that Northern Assurance Co. v. Grandview Building Association, 183 U. S. 308, and Eddy v. National Union Indemnity Co., 80 F.(2d) 284 (9th CCA), involved facts on all fours, or nearly so, with the facts in the case at bar and that those cases do control here and make erroneous the action of this [121] court in submitting this case to the jury.

In those cases, it seems to me, the insured took some part in disclosing to the insurance agent some of the conditions misstated in or prohibited by the policy, but in the case at bar the insured took no part in ascertaining for or disclosing to the insurer or its agent the facts or terms of the policy. The insured here merely assented to the writing of the insurance by the insurer's agent, and the latter who for the purpose of writing this insurance exercised general authority and alone for the company executed the policy, undertook to and did ascertain or know all of the facts concerning the use of the insured property at the inception of the policy and regarding which facts the contract conditions are now in dispute. All that was done before and at the beginning of the contract relationship which is now objected to was done by the insurer and its agent and that seems to me to distinguish this case from

those relied upon by the insurer. (The question whether changes in the property's use made after execution of the policy increased the risk was appropriately submitted to the jury which found against the insurer.) I cannot therefore apply the rule of the Northern Assurance Company case (183 U. S. 308) and of the Eddy case (80 F.(2d) 284) because of their above mentioned distinguishing facts and because to apply that rule here where the insurance company did everything (except that relating to subsequent changes in use of the property) it now complains of would cause such obvious injustice to the insured, without legal excuse.

The motions for judgment n. o. v. or for a new trial will be denied.

This memorandum decision is substituted for and will take the place of all oral statements made by the court concerning those motions at the argument upon them.

Plaintiffs' Exhibits 1, 2, 3, 4, 5, 6 and 7, and Defendant's [122] Exhibits A-1, A-2 and A-3, are by the court's order forwarded direct to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

At the time of filing its motion for a judgment notwithstanding the verdict, the defendant filed its motion in the alternative, in the event of the denial of such motion for a new trial, which motion was by leave of court withdrawn.

There was judgment on the verdict, and the defendant appeals.

And the defendant prays that this, its bill of exceptions, may be allowed, settled and signed.

FIDELITY AND GUARANTY
FIRE CORPORATION
By DAVIS AND GROFF
Its Attorneys of Record [123]

[Title of District Court and Cause.]

CERTIFICATE OF JUDGE SETTLING BILL OF EXCEPTIONS

I, John C. Bowen, District Judge of the above entitled court, who presided in the trial of the above entitled cause in the above entitled court, and before whom all matters and proceedings in the above entitled cause were heard, do hereby certify that the matters and proceedings embodied in the foregoing Bill of Exceptions are matters and proceedings occurring in said cause and in the trial thereof, and that the foregoing Bill of Exceptions contains all of the material facts, matters, things, proceedings, rulings and exceptions thereto, occurring upon the trial of said cause and not heretofore a part of the record herein, and includes all of the evidence adduced at said trial, and that the exhibits set forth or referred to, or both, in the foregoing Bill of Exceptions constitute all of the exhibits offered in evidence in said trial, and I hereby make said exhibits a part of the foregoing Bill of Exceptions.

I do further certify that I do hereby approve, sign, certify and settle the foregoing Bill of Exceptions as a full, true and correct Bill of Exceptions in this cause, and that the same is in proper form and conforms to the truth; and the clerk of this court is hereby ordered to file the same as a part of the record in said cause, and further to attach to the said Bill of Exceptions all the exhibits not set forth therein; and to transmit the said [124] entire Bill of Exceptions, including all exhibits whatsoever, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the foregoing Bill of Exceptions has been and now is settled, certified and approved within the judgment term and within the time provided for filing, presentation, settling and certifying such Bill of Exceptions.

Done in Open Court this 11th day of April, 1938.

JOHN C. BOWEN
District Judge

Approved.

DAVIS and GROFF
Counsel for Fidelity and
Guaranty Fire Corp.

RAY R. GREENWOOD and
H. SYLVESTER GARVIN
Attys for Bilquist et al

[Endorsed]: Lodged Mar. 28, 1938. [125]

[Endorsed]: Filed Apr. 11, 1938.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable John C. Bowen, Judge of the District Court Aforesaid:

Now comes the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, by Davis & Groff, its attorneys, and respectfully shows that on the first day of February, 1938, a jury in said court duly impanelled and sworn in the above entitled cause, found and returned into court a verdict against your petitioner and in favor of the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, and on said verdict a final judgment was, on the 28th day of February, 1938, in said above entitled court, entered against your petitioner, Fidelity and Guaranty Fire Corporation of Baltimore.

That said cause is one wherein the plaintiffs, William E. Bilquist, John Myhre and Signe Myhre, seek recovery of and from the defendant, Fidelity and Guaranty Fire Corporation of Baltimore, your petitioner, of the sum of four thousand dollars upon a policy of fire insurance issued by the defendant, your petitioner, to the plaintiff William E. Bilquist on the 10th day of August, 1935, insuring the said William E. Bilquist against direct loss or damage by fire of a certain two-story frame building and household furniture and personal effects contained therein while used and occupied only for

dwelling house purposes, and the case is one in [126] which, under the legislation in force when the act of January 31, 1938, was passed, a review could be had on writ of error.

Your petitioner, feeling itself aggrieved by the said judgment entered thereon as aforesaid, herewith petitions the court for an order allowing it to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith.

Wherefore, the premises considered, your petitioner prays that an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco in the State of California in said circuit, for the correction of the errors complained of, and herewith assigned, be allowed to your petitioner, and that an order be made fixing the amount of security to be given by your petitioner, conditioned as the law directs, to operate also as a supersedeas bond on appeal, and that a citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco in the State of California, and upon the furnishing and approval of such bond by the court, that all proceedings upon such judgment be

suspended until the determination of such appeal by the United States Circuit Court of Appeals.

Dated 8th day of April, 1938.

FIDELITY AND GUARANTY
FIRE CORPORATION,
Petitioner and Defendant
By DAVIS and GROFF
Its Attorneys

[Endorsed]: Filed Apr. 8, 1938. [127]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the Fidelity and Guaranty Fire Corporation (of Baltimore), defendant in the above numbered and entitled cause, and, in connection with its petition for an appeal in this cause, assigns the following errors which appellant avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

First: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court instruct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and place for the

public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which the plaintiffs seek re- [128] covery was not one within the undertaking of the defendant under its said policy of insurance, for recovery under which plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.

Second: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which the plaintiffs seek recovery was not one within the undertaking of the defendant under

its policy of insurance, for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.

Third: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court direct the jury to return a verdict for the defendant because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which the plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and from about April 1st, [129] 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the meaning and intent of the provisions of the said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement other-

wise providing had been endorsed upon such policy, nor added thereto.

Fourth: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and that from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, and with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the intent and meaning of the express provisions of said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon said policy or added thereto, if the hazard be increased by any means within the control or knowledge of the [130] insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto.

Fifth: In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court in-

struct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that it was provided in the policy of insurance, for recovery under which the plaintiffs sue, that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be other than sole and unconditional ownership; that it was not otherwise provided by agreement endorsed upon or added to such policy, and that the interest of the insured was not that of sole and unconditional ownership, and that John Myhre, at the time of the issuing of such policy and thence until and at the time of the occurrence of the loss, was an equal half owner of the insured property as a tenant in common with the insured.

Sixth: In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that it was provided in the policy of insurance, for recovery upon which the plaintiffs sue, that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be other than sole and unconditional ownership; that it was not otherwise provided by agreement endorsed upon or added to said policy; that the interest of the insured was not that of sole and unconditional ownership; and that John Myhre at the time of the issuing of such policy, and thence until and at the time of the oc-

currence of the loss, was an equal half owner of the insured property as tenant in common with the insured. [131]

Seventh: In instructing the jury that if Langer was the agent for the insurance company and acquired knowledge of the ownership and proposed use of the building insured so recently as to reasonably warrant the assumption that he had such knowledge when he wrote the policy, then you will find that such knowledge on his part is imputed to the insurance company for which he acted, and the company having collected a premium and delivered a policy, knowing these conditions to be, will be deemed to have waived them, unless you find that the agent's relation to the insured property or to the transaction was such as to destroy the agency relation existing between him and the insurance company, or unless you find that the agent and the insured plaintiffs colluded to defraud the defendant company, because it directs and permits the jury to find that the defendant waived its right to insist as a defense, upon the provisions of the policy of insurance, that the entire policy, unless otherwise provided by agreement endorsed upon the policy or added thereto, should be void if the interest of the insured was other than that of sole and unconditional ownership, solely upon finding as a fact that the agent, Langer, prior to writing the policy had acquired knowledge that the plaintiff Myhre had an equal undivided one-half interest therein; and further, because it directs and permits

the jury to find that the defendant company waived its right to insist as a defense that the loss sustained was outside of, and not a part of, the undertaking and contract of the policy, which undertaking and contract was to insure the described building and household furniture and personal effects located in the insured dwelling house building while used only for dwelling house purposes, solely upon finding as a fact that the agent, Langer, prior to the time of writing the policy, had acquired knowledge that the insured building had theretofore been used, and the insurer intended to use it in the future, as an inn [132] or hotel, and because such instruction directs and permits the jury to find and return a verdict for the plaintiffs upon the assumption of a waiver of the provisions and undertakings of the policy of insurance, which, under the express terms of said policy, can be modified or waived only by an agreement endorsed upon said policy or added thereto.

Eighth: In denying the defendant's motion, made at the close of the direct testimony of the witness John Myhre, and renewed at the close of the plaintiffs' evidence, to strike the evidence of the said witness as to what was said by the witness and by Bilquist and Langer, and as to what was not said by Langer, received subject to the defendant's objection, as being an attempt to vary the terms of the written contract of insurance by parole testimony, and as an attempt to show a waiver of the terms, provisions and conditions of the policy by parole evidence, and contrary to the provisions of

the policy that its terms, stipulations and conditions could be waived only by agreement endorsed upon the policy or added thereto.

Ninth: In denying the defendant's motion, made at the close of the plaintiffs' evidence, and renewed at the close of all the evidence, to strike all the evidence adduced on behalf of the plaintiffs, received as subject to the defendant's objection, tending in any way to waive, alter or modify by parole testimony the terms of the written policy of insurance.

Tenth: In rendering judgment against the defendant for interest upon the amount of the recovery allowed by the verdict of the jury from February 1st, 1937, and covering a period prior to the date of the judgment and prior to the time of the return into court of the verdict of the jury on February 1st, 1938, no separate recovery of interest having been allowed in such verdict, and the recovery of interest not having been claimed in the complaint.

Wherefore, the defendant and appellant prays that the [133] judgment and verdict be reversed and set aside and that a judgment be entered for the defendant, or, in the alternative, that the defendant be granted a new trial herein.

DAVIS and GROFF
Attorneys for the Defendant
and Appellant.

[Endorsed]: Filed Apr. 8, 1938. [134]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

It appearing to the court that the Fidelity and Guaranty Fire Corporation of Baltimore, defendant in the above entitled cause, has filed in this court its petition for an appeal from the final judgment against it in this cause, dated the 28th day of February, 1938, with an assignment of errors and prayer for reversal,

It Is Hereby Ordered that an appeal as prayed for in said petition be and is hereby allowed.

It Is Further Ordered that the bond on appeal, conditioned as required by law, is hereby fixed at the sum of Five Thousand and no/100 ($5000.00) dollars, and said bond shall operate as a supersedeas and cost bond and shall stay and suspend all further proceedings in this court until the determination of such appeal.

It Is Further Ordered and Adjudged that this court do, and it hereby does, retain and reserve to itself jurisdiction of this cause for the purpose of making all orders and rulings necessary or proper for the settling and certifying of the Bill of Exceptions therein, and for the purpose of approving, signing and settling the same.

Done in Open Court this 11th day of April, 1938.

JOHN C. BOWEN

Judge

[Endorsed]: Filed Apr. 11, 1938. [135]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents, that we Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, the above named defendant, as principal, and United States Fidelity and Guaranty Company, a corporation duly organized and existing under the laws of the State of Maryland, having its principal office and place of business in the City of Baltimore and the State of Maryland, and duly empowered by law to act as and bind itself as a surety, and to transact a surety business within the State of Washington, as surety, are held and firmly bound unto William E. Bilquist, John Myhre and Signe Myhre, plaintiffs in the above entitled action, in the full and just sum of Five Thousand Dollars ($5000.00) to be paid to the said William E. Bilquist, John Myhre and Signe Myhre, plaintiffs, their attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Signed and dated this 11th day of April, A. D. 1938.

Whereas, lately, at a regular term of the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit pending in said court between William E. Bilquist, John Myhre and Signe Myhre as plaintiffs, and the said Fidelity and Guaranty Fire Corporation of Baltimore, as

defendant, and being cause numbered 21098 on the law docket of said court, final judgment was rendered against the said Fidelity and Guaranty Fire Corporation of Baltimore for the sum of Four Thousand Dollars ($4000.00) with interest thereon at the rate of 6% per annum, computed from the first day of February, 1937, and the said defendant Fidelity [136] and Guaranty Fire Corporation of Baltimore has been allowed an appeal to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said William E. Bilquist, John Myhre and Signe Myhre, appellees, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in the State of California, according to law, within thirty (30) days from the date hereof.

Now the Condition of the Above Obligation is such that if the said Fidelity and Guaranty Fire Corporation of Baltimore shall prosecute its appeal to effect, and will pay the amount of said judgment and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; else to remain in full force and virtue.

FIDELITY AND GUARANTY
FIRE CORPORATION OF
BALTIMORE
By DAVIS and GROFF
Its Attorneys of Record

[Seal] UNITED STATES FIDELITY
AND GUARANTY COMPANY
By JOHN C. McCOLLISTER
Its Attorney in Fact

The foregoing bond is hereby approved this 13th day of April, A. D. 1938.

JOHN C. BOWEN
Judge, United States District Court.

Copy of the within bond received this 11th day of April, 1938.

RAY R. GREENWOOD
H. SYLVESTER GARVIN
Attorneys for the Appellees.

Approved as to form.
H. SYLVESTER GARVIN

[Endorsed]: Filed Apr. 13, 1938. [137]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL

To the clerk of the above entitled court:

Please prepare, certify and file with the clerk of the United States Circuit Court of Appeals for the ninth circuit, a transcript of the record in the above entitled cause, including the following records, papers and documents filed in your office in the said cause.

1. Original complaint.
2. Notice of filing petition and bond for removal.
3. Petition for removal.
4. Bond on removal.

5. Order of removal.
6. Defendant's answer.
7. Plaintiff's reply, and Amended Reply.
8. Impanelling jury.
9. Verdict.
10. Motion for judgment notwithstanding verdict and in alternative for new trial.
11. Order denying motion for judgment notwithstanding the verdict and granting leave to withdraw motion for new trial.
12. Withdrawal of motion for a new trial.
13. Judgment.
14. Bill of exceptions taken on trial.
15. Petition for allowance of appeal. [138]
16. Assignments of error and prayer for reversal.
17. Order allowing appeal.
18. Bond upon appeal and approval.
19. Citation upon appeal.
20. This praecipe.

Dated April 15th, 1938.

DAVIS and GROFF
Attorneys for Defendant and Appellant.

Copy of the foregoing praecipe received this 16th day of April, 1938, and no eliminations, additions or amendments thereto are suggested.

RAY R. GREENWOOD
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Filed Apr. 18, 1938. [139]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 139, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit: [140]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 378 folios at 15¢	$56.70
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$62.70

I hereby certify that the above cost for preparing and certifying record, amounting to $62.70, has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 3d day of May, 1938.

[Seal] EDGAR M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By TRUMAN EGGER
Deputy. [141]

[Title of District Court and Cause.]

CITATION UPON APPEAL

The President of the United States of America, to William E. Bilquist, John Myhre and Signe Myhre, Greeting:

You are hereby notified that in a certain case at law in the United States District Court for the Western District of Washington, Northern Division, wherein William E. Bilquist, John Myhre and Signe Myhre were plaintiffs and the Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, was defendant, in which, on the 28th day of February, 1938, a judgment was entered in favor of the said William E. Bilquist, John Myhre and Signe Myhre and against the defendant Fidelity and Guaranty Fire Corporation of Baltimore, an appeal has been allowed the said defendant to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, you, the said William E. Bilquist, John Myhre and Signe Myhre, are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals at San Francisco, in the State of California, thirty (30) days after the date of this citation, to show cause, if any there be, why error appearing in said judgment should not be corrected, the [142] judgment appealed from be reversed, and judgment entered for the defendant, or, in the alternative, the cause be remanded for a new trial, and speedy justice done the parties in this behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 13th day of April, 1938.

[Seal] JOHN C. BOWEN,
Judge, United States District Court for Western District of Washington.

Service of the foregoing citation by delivery to the undersigned of a copy thereof this 13th day of April, A. D. 1938, is hereby acknowledged.

RAY R. GREENWOOD
Attorney for the Plaintiffs and Appellees.

[Endorsed]: Filed April 18, 1938. [143]

United States Circuit Court of Appeals
for the Ninth Circuit

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION of Baltimore, a corporation,
Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE and SIGNE MYHRE,
Appellees.

STIPULATION AS TO PRINTING OF RECORD

The appellant, Fidelity and Guaranty Fire Corporation, hereby, and in accordance with the pro-

visions of paragraph 8 of rule number 23 of the rules of the United States Circuit Court of Appeals for the Ninth Circuit, states that in and upon this appeal it intends to, and will, rely upon all the errors of the trial court set forth in its assignments of error, filed in this cause and numbered first, second, third, fourth, fifth, sixth, eighth, ninth and tenth.

The appellant will not rely upon error of the trial court in its instructions to the jury set forth in the seventh assignment of such assignments of error in this cause, and it hereby waives such seventh assignment of error, and the exceptions upon which such assignment is based, and waives all defenses based upon its fourth and further answer and affirmative defense in its answer contained.

That all of the record incorporated in the transcript is necessary for the consideration of the errors upon which the appellant intends to rely, except the following portions thereof:

A. The fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "and" in line 13 from the top of page 35 of the original certified record and ending with the word "action" in line 13 from the top of page 37 of such certified record.

B. The plaintiffs' reply to such fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "Replying" in line 7 from the top of page 42 of the original certified record and ending with the

word "reply" in line 15 from the top of page 42 of such certified record.

C. The plaintiffs' amended reply to such fourth and further answer and affirmative defense contained in the defendant's answer, and commencing with the word "Replying" in line 7 from the top of page 42 of the original certified record and ending with the word "reply" in line 15 from the top of page 42 of such certified record.

D. The instructions of the court to the jury and the defendant's exceptions thereto, commencing with the word "The" in line 24 from the top of page 46 of the bill of exceptions, and including the remainder of said page 46 and all of pages 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 and 60 of said bill of exceptions, and all of page 61 of said bill of exceptions to and including the word "jury" in line 8 thereof—the same commencing with the word "the" in line 24 from the top of page 105 of the original certified record and including all of the remainder of such page and all of pages 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119 thereof and all of page 120 down to and ending with the word "jury" on line 8 from the top of page 120 of such original certified record.

That the portions of the original certified record so indicated under the letters A, B, C and D are immaterial to any question of error which the appellant will urge upon the appeal, and need not be, and ought not to be, printed.

Dated May 3d, 1938.

DAVIS and GROFF
Attorneys for Fidelity and Guaranty Fire Corporation, Appellant.

Receipt of a copy of the foregoing statement and stipulation as to the printing of the record is acknowledged this 3rd day of May, 1938, and it is hereby stipulated that the parts of the record designated therein under the captions A, B, C and D may be omitted from the printed record.

RAY R. GREENWOOD
Attorney for Appellees.

[Endorsed]: Filed May 5, 1938. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION UNDER RULE 23

It Is Stipulated between the parties hereto, through their respective attorneys of record, that there need not be printed in the printed record to be printed for use in the Circuit Court of Appeals the formal caption to the papers included in the certified original transcript, save to set forth the designation or character of the paper to be printed, and that they may be omitted at the end of such paper, printing or order the formal certificate of

filing, other than the date of filing, the file mark and the signature of the clerk.

Dated at Seattle this 3rd day of May, 1938.

DAVIS and GROFF
Attorneys for Appellant
RAY R. GREENWOOD
Attorney for Appellees

[Endorsed]: Filed May 5, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8835. United States Circuit Court of Appeals for the Ninth Circuit. Fidelity and Guaranty Fire Corporation of Baltimore, a corporation, Appellant, vs. William E. Bilquist, John Myhre and Signe Myhre, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed May 5, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the

United States Circuit Court of Appeals

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

VS.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S BRIEF

DAVIS & GROFF,
(*William Hatch Davis*)
(*Guy B. Groff*)
Attorneys for Appellant.

Office and Post Office Address
1333 Dexter Horton Building
Seattle, Washington

SHEPARD PRINT, KE. 4934

INDEX OF SUBJECT MATTER

INDEX OF AUTHORITIES

Acts of Congress

Washington Statutes

In the

United States Circuit Court of Appeals

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees,

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The action was commenced in the Superior Court of the State of Washington for Kitsap County by William E. Bilquist, John Myhre and Signe Myhre, against the appellant Fidelity and Guaranty Fire Corporation of Baltimore, and F. E. Langer, by the filing with the clerk of a summons and complaint, and

by service on the Insurance Commissioner of the State of Washington, for the appellant.

The action was one of which the United States District Court would have original jurisdiction under 28 U. S. C. A., Sec. 41.

The petition for removal showed that the plaintiffs and the defendant Langer were citizens of the State of Washington, and that the defendant Fidelity and Guaranty Fire Corporation was a citizen of the State of Maryland; that the suit was one of a civil nature at common law of which the United States District Court would have original jurisdiction; that the matter in dispute exceeded three thousand dollars, exclusive of interest and costs; and that there was set forth in the complaint a separable controversy between the plaintiffs and the defendant Fidelity and Guaranty Fire Corporation from that set forth as to the defendant Langer, and that such controversy could be fully determined without affecting the interest of the defendant Langer, or the right of the plaintiffs to recover against him.

The plaintiffs sought recovery against the defendant, the appellant herein, upon a written policy of fire insurance. The claim for recovery against Langer sounded either in negligence or fraud. Langer was not liable upon the policy. A joint liability was not

charged, nor did it exist, and the cause was removable as to the appellant.

The removal is sustained by 28 U. S. C. A. sections 71 and 72, Judicial Code Sec. 28.

No motion was made to remand.

The petition for removal (Tr. 12), the notice of the filing of the petition and bond for removal (Tr. 11), the bond (Tr. 17), and the order of removal (Tr. 20), are in proper form and comply with the acts of Congress.

This appeal is from the final judgment of the United States District Court, and is sustained by 28 U. S. C. A. 225 A; Judicial Code, Sec. 128 (Tr. 67).

SPECIFICATION OF ERRORS RELIED UPON

Appellant will rely upon its assignments of error, numbered first, second, third, fourth and tenth.

Several of the errors relied upon involve more than one assignment. Appellant invoked the favorable action of the trial court by different motions, and the denial thereof was made the subject of separate exceptions and assignments.

Appellant's motions for a directed verdict and for judgment notwithstanding the verdict should have been granted because;

A.

It appeared by the uncontradicted evidence that the loss for which the plaintiffs sought recovery was not one within the coverage of the policy.

The error is covered by the first and second assignments. (Tr. 152, 153). For motions for directed verdict, and exceptions, see Tr. 142-3. For motion for judgment notwithstanding the verdict, and exceptions, see Tr. 143-4.

B.

It appeared by the uncontradicted evidence that the hazzard had been increased within the meaning and intent of the provision of the policy making the entire policy void if the hazzard be increased by any means within the knowledge or control of the insured, by the use of the insured premises as a place for the sale of beer and wine and for public dancing.

The error is covered by the third and fourth assignments (Tr. 154-5). For motions for directed verdict and exceptions (see Tr. 142-4). For motion for judgment notwithstanding the verdict and exceptions (see Tr. 143-4-5).

In its judgment the trial court eroneously added to the amount found due by the verdict, interest covering a period of one year antedating the return of the verdict.

The error is covered by the tenth assignment (Tr. 159). For judgment, and exceptions (see Tr. 67-8-9).

STATEMENT OF CASE

This litigation arises out of a policy of fire insurance issued on August 10th, 1935, by appellant, insuring appellee, William E. Bilquist, for the term of three years, as owner, against all direct loss or damage by fire to the amount of $2,500.00 on the two story, shingle roof, frame building situated on lots 1 and 2 of block 4 and lots 8 and 9 of block 5 of Davis Addition to Manchester, Washington, while occupied only for dwelling house purposes, and to the amount of $1,500.00 upon household furnishings and personal effects owned by the insured, or members of his family, all only while contained in the above dwelling house building.

The policy was subject to the following stipulations and conditions incorporated therein.

> No officer, agent or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any

privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached (Tr. 77).

2. This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the hazzard be increased by any means within the control or knowledge of the insured (Tr. 80).

No waiver of any condition or stipulation of the policy was ever endorsed thereon or added thereto, and no application was ever made therefor.

At the time the policy was issued F. E. Langer was president, managing officer and principal stockholder of the Kitsap County Bank, located at Port Orchard, county seat of Kitsap county in which Manchester is situated, and was also the local agent for the appellant at Port Orchard.

The insured property was then owned by William E. Bilquist and John Myhre and wife, as tenants in common, and was subject to a first mortgage to the Kitsap County Bank executed by them, and to a second mortgage to Clarence Jones. That Myhre had put money into the property and had an interest in it, was known to Langer but not to the appellant. Langer told Myhre that he would like to write the insurance and Myhre said he could. They agreed for $2500.00 on the building and $1500.00 on the personal property. No written application was made. Langer filled out

Standard Bureau Form 548 (Tr. 73-115), and sent it to appellant's general agents at Seattle to have the rate fixed and the policy written. It was there written in accordance with the information received from Langer and sent to Langer to be signed and delivered by him. The form referred to became a part of the policy, and by direction of Langer, the loss, if any, was made payable, first to the Kitsap County State Bank, first mortgagee, and second, to Clarence Jones, second mortgagee. Langer signed the policy and turned it over to the first mortgagee for keeping.

The insured building had been used as a summer hotel. That it was the intention of the owners to so use it was known to Langer, but unknown to the appellant. He received no instructions from Myhre or Bilquist as to how the insurance should be written.

The policy was issued in consideration of a premium of $77.00, charged to and paid out of the account of John Myhre in the Kitsap County Bank. Had the policy been written for occupancy as an inn or hotel, under the regulations of the Washington Surveying and Rating Bureau, a bureau under the control and supervision of the Insurance Department of the State of Washington, it would have been insurable only for one year, and the applicable rate for one year would have been $138.40.

The furnishings and effects contained in the insured building were the furnishings and equipment of a hotel or inn, or of a beer parlor, and were not household furnishings, nor the personal effects of the insured, or of any member of his family.

Subsequently, the policy, as Langer testified, was given to Myhre for examination, or, as Myhre testified, merely shown to him, and Myhre discovered that his name was not included as an insured and told Langer that he was a half owner and that if he was going to pay for the policy he wanted his name on it. Langer accordingly attached to the policy a rider making the loss, if any, payable firstly and secondly as originally provided, and thirdly, to John and Signe Myhre, third mortgagees. Except upon this occasion no one requested the privilege of examining the policy. Myhre made no inquiry as to whether, or how, his objection had been met, and until after the fire did not know that he appeared in the policy as a third mortgagee. No other objection to the policy as written was ever made.

At the time the policy was issued the insured building was being occupied as a summer hotel or inn, where meals and lodgings were sold to the public. From December 1935 to April 1936, it was closed. In April 1936, Ervin Moen, acting under a profit sharing ar-

rangement with appellees, obtained from the Washington State Liquor Control Board a license to sell beer and wine in the building and installed a bar and counter with stools in a room at the northwest corner. From that time, and until its destruction by fire, the building was occupied by the appellees in part as an inn or hotel and in part as a place for the public sale of beer and wine and as a place for public dancing. Appellees employed a man who played the piano for the dancing which was permitted until closing time about 1 o'clock A. M.

No additional wiring or heating apparatus was put in when the beer parlor was installed. There were complaints against places selling beer in Manchester and after a hearing the Washington State Liquor Control Board refused to renew any licenses.

Occupancy for the public sale of beer and wine was not authorized by the policy and increased the hazzard over the hazzard incident to occupancy for dwelling house purposes only, and over that incident to its occupation for the purpose of selling meals and lodgings, and was not known to Langer or to the appellant until after the property was destroyed by fire.

On September 12th, 1936, the property was totally destroyed by fire. Its cause was unknown.

A proof of loss was filed with appellant on December 3rd, 1936. Appellant rejected it, in part, because the building was not occupied only for dwelling house purposes, and because the hazzard had been increased by means within the knowledge and control of the insured. It denied liability under the policy and tendered to the appellees the amount of the premium paid with interest thereon at 6% per annum from the date of payment to the date of tender; which tender was refused.

In their complaint the appellees alleged that Langer for the protection of his own bank and upon his own motion and instance caused to be written and delivered to his own bank the policy of insurance sued upon. Upon removal to the District Court, the appellant answered, admitting the issuance of the policy; that Langer caused it to be written at his own instance for the protection of his bank; the loss of the building and contents by fire; the filing of proof of loss and its rejection; but otherwise denying the allegations of the complaint and incorporating the following affirmative defenses.

> That the appellant under the policy undertook and agreed to insure the described building while said building was used and occupied only for dwelling house purposes, and not otherwise, and undertook and agreed to insure the described household furnishings and personal effects only while contained

in the described dwelling house building and while the same was used only for dwelling house purposes, and not otherwise; and that said insured building was not used and occupied only for dwelling house purposes, but on the contrary at the time of its destruction by fire was used and occupied for business purposes and as a hotel or inn and as a place for the public vending and sale of beer and wine, and for public dancing (Tr. 33, 39, 40, 41).

2. That from and after the 6th day of April, 1936, and until its destruction by fire, the insured building was in part used for the sale and vending to the public of beer and wine under license from the Washington State Liquor Control Board, and as a public dance hall where public dancing was permitted for compensation. That such a use was within the knowledge and control of the insured and increased the hazzard of the insurance, and under the terms and stipulations of the policy rendered the entire policy void; and that no agreement otherwise providing was ever endorsed upon the policy or added thereto (Tr. 41, 42, 43).

In its answer the appellant tendered the amount of premium paid, with interest thereon.

The appellees filed a reply and an amended reply admitting the terms, conditions and stipulations of the policy, the extent of the undertaking of the appellant thereunder (Tr. 55), that the insured building when the policy was issued was not being used only for dwelling house purposes but was used as an inn or hotel where meals and lodgings were sold to the public (Tr. 55); the procuring of a license for the sale of

beer and wine and the use of the insured premises with the knowledge and under the control of the insured as a hotel or inn and as a place for the public sale of beer and wine and for public dancing, continuing to the time of the fire; that no agreement permitting such use was ever endorsed upon the policy or added thereto; the tender of the premium with interest; and otherwise generally denying the allegations of the affirmative defenses except as admitted or qualified by the allegations of the complaint, and alleging that the use of the property at the time of the writing of the policy and its subsequent use as a place for selling beer and wine and for public dancing was known to the appellant's agent and did not increase the hazzard (Tr. 55).

Upon the trial before a jury the appellant objected to the introduction of oral testimony of conversations between Langer, Bilquist and Myhre relied upon to establish a waiver of the conditions and stipulations of the policy, in violation of provisions as to the manner in which its conditions and stipulations alone might be waived. The objection being overruled such testimony was received by agreement subject to appellant's motion to strike (Tr. 96). A motion to strike was denied (Tr. 127).

At the close of all the evidence the appellant chal-

lenged the legal sufficiency of the evidence to sustain a verdict for the plaintiffs and moved that the court withdraw the case from the consideration of the jury and direct a verdict for the defendant. The motion was denied.

In submitting the cause to the jury the court reserved for its later and subsequent consideration the determination of all questions of law arising upon the appellant's motion for a directed verdict.

On February 1, 1938, the jury returned a verdict in favor of the appellees in the sum of $4,000.00.

Thereupon the appellant filed its motion for a judgment in its favor notwithstanding the verdict, which motion, being heard and considered, was denied. A memorandum opinion thereon was filed by the court (Tr. 145).

Judgment was entered on February 28th, 1938, for the appellees to recover from the appellant the amount of the recovery allowed by the verdict, plus interest thereon from February 1, 1937. The appellant appealed.

ARGUMENT.

Proceedure.

A.

The appellant's first and third assignments of error are based upon the denial of its motions for a directed verdict.

At the close of all the evidence the appellant challenged the legal sufficiency of the evidence to sustain a verdict for the plaintiffs, and moved that the court instruct the jury to return a verdict for the defendant (Tr. 142).

The question of whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action, is a question of law which arises in the progress of the trial. When the trial is before a jury the question is reviewable on exception to a ruling upon a request for a preemptory instruction for a verdict.

Dunsmuir v. Scott, 217 F. 200.

The motion for a directed verdict is sufficiently definite if it challenges the legal sufficiency of the evidence to sustain a verdict for the plaintiffs.

In *Balakla Cons. C. Co. v. Reardon*, 220 Fed. 584 a motion for a preemptory instruction that the jury under the law and the evidence must return a verdict for the defendant was, by this court, held sufficient (589).

It is in substance a motion for a directed verdict. There is no substantial difference between it and a directed verdict. Both present a challenge to further proceedings upon the ground that the evidence under

the law will not sustain a verdict in favor of the adverse party, and that there is no issue for examination by the jury.

Where the contention is the broad one that the proof as a whole fails to disclose liability, a general motion is sufficient to challenge the attention of court and counsel to the legal point involved.

Jefferson Standard Life Ins. Co. v. Stevenson 70 F. (2d) 72.

New York Life Insurance Co. v. Doerksen, 75 F. (2d) 96.

Standard Oil Co. of Ky. v. Noakes, 59 F. (2d) 897-899.

B.

Appellant's second and fourth assignments of error are based upon the denial of its motion for a judgment notwithstanding the verdict.

The testing of the legal sufficiency of the evidence to sustain a verdict by motion for judgment notwithstanding the verdict, is one of the rules of practice and modes and forms of procedure obtaining in the state of Washington, to which conformity is required in the Federal courts by the "Conformity Act."

U. S. C. A. Title 8, Sec. 724.

For motion for judgment notwithstanding verdict (see Tr. 59).

> "Whether a defendant in an action at law may present in one form or another, or by demurrer to the evidence, the defense that the plaintiff upon his own case shows no cause of action, is a question of practice, pleadings, forms and modes of proceedure, as to which the courts of the United States are now required by the Act of Congress, June 1, 1872, C 255, 17 Stat. 197, reenacted in Sec. 914 of Revised Statutes, to conform as near as may be to those existing in the courts of the state in which the trial is had."
>
> Mr. Justice Hughes, dissenting opinion, in *Slocum v. New York Life Ins. Co.* 228 U. S. 364 P. 421.

The motion for judgment notwithstanding the verdict has the authority of statutory enactment in the state of Washington.

Rem. Rev. Stat. of Wash., Sec. 387.

In *Roe v. Standard Furniture Co.* 41 Wash. 546, 83 P. 1109, it was held that it was competent for the trial court after a verdict for the plaintiff to entertain a motion by the defendant for a judgment notwithstanding the verdict and to enter a judgment for the defendant. Historically the motion was one that could only be made by the plaintiff, but the practice has been changed in this state and it is now proper to enter a final judgment on a motion non obstante vedicto in favor of either party where the undisputed evidence warrants it (p. 548-550).

Hanson v. Washington Water Power Co., 165 Wash. 497; 5 P. (2d) 1025.

Haydon v. Bay City Fuel Co., 167 Wash. 212; 9 P. (2d) 98.

Dailey v. Pheonix Investment Co., 155 Wash. 597; 285 P. 657.

Upon motion for judgment notwithstanding the verdict in these cases final judgment was entered for the defendant.

The only case throwing any doubt upon the right of a Federal District Court to entertain such a motion, and of the Circuit Court of Appeals to review its ruling thereon, and to enter the appropriate judgment is the case of *Slocum v. New York Life Ins. Co.* 228 U. S. 364, where the court divided five to four, and the four joined in an able dissenting opinion written by the present chief justice.

The majority opinion proceeds upon the theory that where a jury in a Federal court has rendered a verdict the matter can not be reexamined upon motion for judgment *non obstante verdicto* and final judgment entered without violation of the seventh amendment to the Federal constitution. It has been distinguished, but never followed.

Baltimore and Carolina Line v. Redman, 295 U. S. 654; 79 Law Ed. 1636 was an action to recover for

personal injuries caused by defendant's negligence. At the conclusion of the evidence in the District Court the defendant moved for a directed verdict upon the ground of insufficiency of the evidence to sustain a verdict for the plaintiff. The court submitted the case to the jury reserving for consideration the questions of law involved in the motion for a directed verdict. A verdict was returned for the plaintiff. Thereafter the court considered the motion for a directed verdict and the evidence and considering it sufficient to sustain the verdict entered judgment for the plaintiff. Upon appeal the Circuit Court of Appeals held the evidence insufficient and reversed the judgment, holding that under the rule in *Slocum v. New York Life Ins. Co.* 228 U. S. 364, it could not enter final judgment but must remand for a new trial. Upon *certiorari*, the Supreme Court granted a judgment of dismissal upon the merits. In the opinion it is said:

> "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments." p. 659.

It is apparent that when a cause is submitted to a jury with a reservation by the court of all legal questions involved in a motion for a directed verdict, the re-examination of fact, if any, involved in the subsequent consideration of such questions, in the rulings thereon, and in the review by the appellate court, is in accordance with the rules of the common law. This is all that is required by the seventh amendment to the Federal constitution.

The trial court purposely reserved for its later consideration all questions of law arising upon the motion for a directed verdict in order that the case might be finally disposed of upon appeal (Tr. 143).

It is obvious that the court now considers that *Slocum v. New York Life Ins. Co.* 228 U. S. 364 should not apply where the facts are not identical. The majority opinion recognized the duty of the trial court to have granted the motion for a directed verdict and to have entered judgment accordingly, but proceeds to its conclusion that having submitted the case to the jury the seventh amendment stood in the way of any court thereafter entering the judgment that the trial court should have entered.

If the constitutional objection was a valid one it could not be overcome by rule of practice.

Yet the Supreme Court of the United States, by its

Federal Rules of Civil Proceedure, effective September 1, 1938, governing the procedure in the District Courts of the United States, Rule 50 sub. div. b, has provided.

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside, and to have judgment entered in accordance with his motion for a directed verdict; or, if a verdict was not returned, such party within ten days after the jury has been discharged may move for a judgment in accordance with his motion for a directed verdict. * * * If a verdict was returned, the court may allow the judgment to stand, or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed, or may order a new trial."
>
> U. S. Supreme Court, Law Ed. Advance Opinions Vol. 82, No. 8, page 22 of Rules of Civil Procedure.

It is not contended that these rules are applicable to this case, but that the application of the decision in *Slocum v. New York Life Ins. Co.* to a case where the legal questions arising upon a motion for a directed

verdict are reserved for later consideration in submitting a case to a jury, is not in accordance with the present views of the Supreme Court.

That court has either swung to the views of the four dissenting justices that a motion for a directed verdict submits the question of whether there is any fact for the examination of a jury, and that the re-examination of the question of whether there was any issue of fact for the jury is not a reexamination of any fact tried by a jury, or else it is of the opinion that where the questions of law are reserved, a reexamination of such questions is in accordance with the rules of the common law.

The matter bears only upon the judgment to be entered in case error be found.

Slocum v. New York Life Ins. Co. 228 U. S. 364.

ARGUMENT ON ASSIGNMENTS OF ERROR.

I.

The appellees were not entitled to recover. The loss was not one within the coverage of the policy.

The question arises under both the first and second assignments of error; the first arising from the denial of the motion for a directed verdict, and the second from the denial of the motion for a judgment notwithstanding the verdict.

The first assignment is as follows:

> In denying the defendant's motion made at the close of the plaintiff's evidence and renewed at the close of all the evidence, that the court instruct the jury to return a verdict for the defendant because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been used and occupied as an inn or hotel and as a beer parlor and place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by the fire was not household furniture nor personal effects and were not at the time of their destruction contained in a dwelling house building, and that the loss for which the plaintiffs seek recovery was not one within the undertaking of the defendant under its said policy of insurance, for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes, and to household furniture and personal effects while contained in such dwelling house building.
>
> Tr. 152.

The second assignment is as follows:

> In denying the defendant's motion that the court enter a judgment for the defendant notwithstanding the verdict of the jury, because it appears by the uncontradicted evidence that the insured building at the time of its destruction by fire was, and for a considerable time theretofore had been, used and occupied as an inn or hotel and as a beer parlor and as a place for the public vending and sale of beer and wine and for public dancing, and not for dwelling house purposes only, and that the furniture and equipment destroyed by fire was not household furniture nor personal effects and

were not at the time of their destruction by fire contained in a dwelling house building, and that the loss for which plaintiffs seek recovery was not within the undertaking of the defendant under its policy of insurance for recovery under which the plaintiffs sue, which undertaking was limited to a loss while the insured building was occupied only for dwelling house purposes and to household furniture and personal effects while contained in such dwelling house building.
Tr. 153.

That the loss sustained while the building was occupied as an inn or hotel and as a place for the vending and sale of beer and wine, and as a place of public dancing was not within the coverage of the policy, is undisputable. The appellees sought to extend the coverage by the application of the doctrine of estoppel.

A.

The law of the State of Washington upon the question of whether the coverage of a policy of insurance, or the restrictions thereon, can be altered, waived or modified by the application of the doctrine of estoppel, is controlling upon the Federal courts.

The contract arising in the state of Washington, its laws establish the rule of decision. The decisions of its highest court are to determine whether the coverage, or the restrictions thereon, may be modified without reformation in equity so as to permit a recovery contrary to the terms of the insurer's undertaking as expressed in the policy.

It seems now to have been clearly determined that the law of the state is to be applied by the Federal Courts in all matters of substantive law, not directly governed by the Constitution of the United States or by the Acts of Congress.

Erie Railroad Co. v. Tompkins, U. S. Sup. Court Adv. Op. Law Ed. Vol. 82 p. 787, decided April 25th, 1938.

B.

The law of Washington draws a distinction between those things in a policy of insurance which constitute representations, conditions or warranties, the breach of which forfeits the contract, and those things which constitute the essential undertaking of the insurer.

In *Reynolds v. Pacific Marine Ins. Co.*, 98 Wash. 362; 167 P. 745 it was held that a clause inserted in a fire insurance policy on a boat warranting that it would be employed in the waters of Puget Sound, British Columbia and Southwestern Alaska not north of Wrangel Narrows, and not to use the west coast of Vancouver Island, was an essential part of the contract and not a warranty. The boat was destroyed by fire while in waters beyond the prescribed limits. A judgment for the insured was reversed because the provisions referred to were a part of the essential undertaking of the contract as much as any other promise to insure.

In *Johnson v. Franklin Ins. Co.*, 90 Wash. 631; 156 P. 567 a stipulation in a policy that the goods were insured "while contained in the frame building while occupied only as a dwelling at No. 30 Franklin St. King County, Washington, was held of the essence of the contract, and the court could not hold that the policy covered the goods elsewhere without making a new contract for the parties. Judgment for the insured was reversed and remanded with direction to enter judgment for the insurer.

The distinction between the application of the doctrine of estoppel to cases where the policy is sought to be forfeited or avoided for breach of some condition or warranty, and to cases where the insured seek to extend the coverage of the policy, and thus bring into existance a liability contrary to the express provisions of the contract, is clearly pointed out by the decisions of the Supreme Court of Washington.

The latest case is that of *Carew, Shaw and Bernasconi v. General Casulty Co.*, 189 Wash. 329; 65 P. (2d) 689 which involved an appeal from a judgment in favor of the insurer notwithstanding a verdict for the insured, in an action to recover on a burglary policy covering a chest inside a safe. The plaintiff was a corporation conducting a department store. An agent of the insurer attempted to interest its officers in fire

insurance, but was informed that the company desired nothing other than burglary safe insurance. A representative of the insurer examined plaintiff's safe to determine the proper premium. Investigation disclosed that a chest inside the safe was burglar proof and would carry a rate of $5.00 per thousand, while the safe itself, being fireproof only, would take a rate of $16.50 per thousand. The appellant decided to obtain the insurance from the respondent, and a binder was ordered to give protection pending the delivery of the policy. The binder covered the entire safe and was sent to the appellant's vice president who examined it, and, finding it in accordance with his oral directions, filed it away. Shortly afterwards a policy covering only the chest was delivered, and appellant's vice president assuming that it followed the terms of the binder, filed it away without reading it. The safe was later burglarized and a large amount of money taken; the chest was not entered.

The court said:

> "Patently, in the absence of events and conditions which, under the terms of the policy, must occur and exist in order to obligate the insurance company to pay the loss, the appellant could not recover under the policy as written." (P. 335).

In speaking of cases involving estoppel, the court said that in those cases the insured was entitled to re-

cover under the policy as written. In those cases the insurer had defended upon the ground that the policy was void for breach of a condition or warranty.

> "This is a case in which the insured seeks to extend the coverage of the policy. This can be done only by reformation. p. 336, *supra.*

Here the appellant is defending upon the ground that assuming the policy to be in full force and effect, the loss claimed is not within its undertaking.

Where the insured can not recover under the policy as written his only remedy under the law of Washington is a reformation of the contract.

This is made exceedingly clear in the opinion cited, where Millard, J. says:

> "One may not by invoking the doctrine of estoppel or waiver, bring into existence a contract not made by the parties and create a liability contrary to the express provisions of the contract the parties did make. The general rule is that while an insurer may be estopped by its knowledge or by statute from insisting upon a forfeiture of a policy, yet under no conditions can the coverage, or the restrictions on the coverage, be extended by the doctrine of waiver or estoppel."
>
> *Carew, Shaw & Bernasconi v. General Casualty Co.*, 189 Wash. 329-336 P. (2d) 689.

To the same effect is the case of *Charada Inv. Co. v. Trinity Universal Ins. Co.*, 188 Wash. 325; 62 P. (2d) 722, which involved a burglary insurance policy upon

a safe and contents. The safe contained 16 compartments, some of which were used by the insured's tenants. It appeared that an agent of the insurer visited insured's place of business and was informed that a policy was desired which would protect valuables in the safe and particularly during business hours when the safe door would remain open, and that the agent agreed to furnish such a policy. Thereafter the agent delivered to the insured a policy which the insured believed and the agent assured him gave the protection promised. The coverage of the policy insured against loss by felonious entry into the safe by force and violence while the safe was duly closed and locked.

The safe was entered while the door was unlocked. A locked inner compartment was entered by force and money taken. The plaintiff brought suit, asking that the policy be reformed so as to cover a loss whether the outer door of the safe was locked or not.

Upon the opening statement of the insured's attorney, the trial court entered an order of dismissal upon the belief that the attorney had waived the claim for reformation of the contract.

Upon appeal, the Supreme Court said that the plaintiff could not recover upon the policy as written, but that the trial court was in error in concluding that counsel in his opening statement had abandoned his

claim for reformation, and that the dismissal was premature.

If the appellees are to recover, they must recover according to the contract. Having sued on it, they must stand on it, and before they may recover they must bring the loss within the coverage of the policy.

Even though all possible estoppels be asserted against the appellant, preventing it from availing itself of any of the provisions of the policy to enforce a forfeiture, they still may not recover under it.

It is the law of Washington that the insurer is entitled to stand on its contract as written, and the insured must bring himself within the terms of the policy before he can establish the insurer's liability thereon.

Isaacson Iron Works v. Ocean Accident and Guaranty Corp., 191 Wash. 221-224; 70 P. (2d) 1026.

Notwithstanding the admission over objection of parole testimony tending to show knowledge by the defendant's agent of the purpose for which the insured building had been used and the purpose for which it was then intended to use it, that he himself wrote the application, that no instructions were given him as to what to put in it—apparently admitted either for the purpose of varying the terms of the written policy, or of establishing an estoppel, parole testimony is in-

sufficient to avail the appellees, because:

1. The coverage, or the restrictions thereon, of a policy of insurance, can not, under the laws of Washington, be changed by application of the doctrine of estoppel.

Carew, Shaw & Bernasconi v. General Casualty Co., 189 Wash. 329; 65 P. (2d) 689.

2. Although the evidence was received (over objection) it is, even after its reception, ineffective to waive or alter the terms of the written policy.

In the State of Washington, the rule that parole evidence may not be received to vary the terms of a written contract is a rule of substantive law and not merely a rule of evidence. If received it is no more effective than if excluded.

> "While the rule known as the parole evidence rule is usually referred to as a rule of evidence, it is more properly a rule of substantive law, since it is a rule of substantive law and not any rule relating to the admissibility of evidence that gives the rule effect."
>
> *Andersonian Inv. Co. v. Wade*, 108 Wash. 373-380; 184 P. 327.

There was objection (Tr. 96), and motion to strike (Tr. 127).

The rule which prohibits the modification of a written contract by parole is one of substantive law, and

not one of evidence. There is no waiver of the right of a party thereto to adhere to the contract as written and have the case determined thereby, merely because parole evidence of what transpired outside the writings has been permitted to come in.

Pitcairn v. Phillip Hiss Co., 125 F. 110.

It is the law and not a rule of evidence that conclusively presumes the finality of written agreements.

Andersonian Inv. Co. v. Wade 108 Wash. 373-380; 184 P. 327.

The coverage of the policy was against direct loss by fire while located and contained as described in the policy, and not elsewhere, to-wit:

> $2,500.00 on two story shingle roof frame building and additions in contact therewith, while occupied only for dwelling house purposes (Tr. 73).
>
> $1,500.00 on household furnishings and personal effects * * * owned by the insured or members of his family, all only while contained in the above dwelling house building (Tr. 74).

Appellees brought suit on the policy as written, making no allegation of waiver or modification, except that the true situation and use of the property was known to Langer and to the appellant (Tr. 34).

Two of the principal uses of the property at the time of the fire were not such uses as are incident to

the occupation of a building only for dwelling house purposes.

1. The occupation and use as a hotel or inn.
2. The occupation and use as a beer parlor and place for the public sale of beer and wine and for public dancing.

In its first affirmative defense the appellant alleged that the insured building until its destruction by fire was occupied for business purposes, and particularly as a hotel or inn where meals and lodging were sold to the public for compenstion. Par. V. First Affirm. Def. Tr. 29.

Neither the reply nor the amended reply denied such allegation; but expressly admitted the use as an inn. Par. IV of Reply to First Affirm. Def. Tr. 46; Par. IV of Amended Reply to First Affirm. Def. Tr. 51.

The appellees bought the property intending to use it as an inn, and immediately began fitting it up as an inn (Tr. 71). When the deal was completed Bilquist immediately took possession and started business (Tr. 100). Their main business was serving meals, beds and over week-end guests (Tr. 103). They served banquets, at one time serving 85 persons, and at another, 75 (Tr. 103). In April, 1936, Ervin Moen obtained a license to operate a beer saloon on the premises (Tr. 109),

which he conducted under an arrangement with Bilquist for a division of profits (Tr. 108), up to the time of the fire (Tr. 101). A room formerly used as a sitting room became a bar room (Tr. 103), and the dining room was used for dancing (Tr. 107), and for serving beer and wine (Tr. 109). A piano player was employed and dancing had every night (Tr. 101), the place remaining open until one o'clock at night (Tr. 105). At times they had big crowds and let them have a good time (Tr. 105). The guests could amuse themselves by dancing, drinking beer and staying up until one o'clock in the morning. As many could come as the place could conveniently hold. They usually had what they considered a choice crowd (Tr. 106). Langer made no endorsement on the policy waiving any of its provisions (Tr. 121). He was not at the place after it became a beer parlor and had no knowledge of how they conducted their business. He never orally, or otherwise permitted the opening of a beer parlor (Tr. 123). He was not informed that a beer parlor was being put in. Bilquist told Myhre of the beer parlor but did not tell Langer (Tr. 109).

There is no evidence that Langer had knowledge of the use of the property for the sale of beer or wine, or for public dancing.

In its third affirmative defense the appellant alleged

the granting of a license for the sale of beer and wine in the building described in the policy, and the use and occupation of portions of such building, until its destruction by fire, as a place for the vending and sale of beer and wine to the public and for public dancing. Par. II III Third Affirm. Def. Tr. 39-40.

These allegations were admitted, but it was affirmatively alleged that these things were known to the appellant or to its agent, Langer. Par. II & III of Reply to Third Affirm Def. Tr. 49. Par. II & III of Amended Reply to Third Affirm. Def. Tr. 55.

The burden was on the appellees to both allege and prove that their loss was within the coverage of the policy. They did neither, but sought a recovery contrary thereto.

C.

The use of the building as a hotel or inn was not an occupation for dwelling house purposes only, and a loss occurring during such use is not within the coverage of the policy.

The question under the law of Washington is whether the use is one ordinarily incident to occupation as a home. If not, and it be one of the principal uses of the property, then a loss arising during such occupation is not within the coverage of a policy insuring while occupied only for dwelling house purposes.

That is the substance of the holding in *Ragley v. Northwestern Nat. Ins. Co.* 151 Wash. 545; 276 P. 537. It was there held that an instruction to the jury that if they found that the insured building was being generally used as a place for the manufacture of intoxicating liquor, or that one of its principal uses was the manufacture of intoxicating liquor, their verdict should be for the insurer, was proper. The court pointed out that the evidence was not sufficient to show that manufacture of liquor was one of the principal uses of the house, and that in view of the great number of uses ordinarily incident to the occupation of a house as a home, the court could not say as a matter of law that the trial court erred in its instruction that to avoid the policy the insured building must be used generally for the objectionable purpose or that it must be one of its principal uses. The court seemed to be in some doubt as to what uses were incident to occupation as a home. Judicial opinions must be interpreted by the light of the times in which they were written. This opinion was written in April, 1929, and the court evidently recognized that the manufacture of "home brew" for the use of the occupant, was one of the ordinary uses to which dwelling houses were then being put.

Hartman v. Farmers Mutual Ins. Co., 163 Wash. 490; I P. (2d) 913, involved the use of a portion of

the premises as a place for brooding chickens. The case is of little weight because the policy did not require that the insured building be used exclusively as a dwelling (p. 492).

In *Clark v. Western Ins. Co.* 168 Wash. 366; 12 P. (2d) 408, a residence property, insured under a policy limiting the coverage to a loss "while occupied only for dwelling house purposes," was rented to a tenant who used it to conduct a distillery. Verdict and judgment for the insured was reversed on appeal. The Court said:

> "It can not in reason be questioned that the use to which the house in this case was put, either generally or as one of its principal uses at and prior to the fire, was the manufacture of intoxicating liquor, and it must be so held as a matter of law" (p. 370).

Allen v. Merchants Fire Assur. Corp. 179 Wash. 189; 36 P. (2d) 545 involved a policy insuring property only while occupied for dwelling house purposes, and a clause making the policy void in case of increased hazzard. Allen made a contract to sell the property to Commellini. The deed and policy were placed in escrow with a bank which was also the agent for the insurer. Commellini used the property for the business of selling and serving Italian dinners. As against the interposition of these defenses the insured contended that

notice of the change from a dwelling house to a place of public entertainment had been given to the escrow clerk of the bank. Recovery on the policy was denied.

Noting that the insured gave notice to the Insurance Department of the Bank of the change of possession, the Court said: *"But unfortunately, he did not give that department notice of the change of use from that of a dwelling house to that of a place of public entertainment, which would increase the risk and the rate."* (p. 194) (Italics ours).

The term hazzard was used in the policy in that case, but risk and hazzard are synonomous terms.

McCullough v. Northwestern Mut. Fire Assn. 183 Wash. 5; 48 P. (2d) 217, reviews previous cases and distinguishes the case of *Ragley v. Northwestern Nat. Ins. Co.* upon the ground that the operations in that case were not upon such a scale as to be commercial in their scope.

We find no instance in the Washington decisions of a commercial use of an insured building being held to be one of the proper or ordinary uses of a dwelling house.

The use for a hotel and beer parlor constituted an occupation for commercial purposes.

The decisions of the Supreme Court of Washington

cited under sub-div. C, are equally application to an occupation for a hotel and to an occupation for the purpose of the public sale of beer and wine.

Beer and wine may not be lawfully sold in a dwelling house in the state of Washington. An occupation for that purpose can not be considered as an occupation for dwelling house purposes.

The sale of beer and wine in the state of Washington can lawfully be made only under license from the Washington State Liquor Control Board.

Laws 1933, Ex Ses. Sec. 63, Chap. 62.
Rem. Rev. Stat. (Wash.) Sec. 7306-63.

With the exception of clubs and organizations holding picnics, licenses can be granted only to hotels, restaurants, drug stores, soda fountains, taverns, and dining places on boats, aeroplanes, dining, club and buffet cars on passenger trains.

Sec. 2 Chap. 158, Laws of 1935 (Wash.).

A commercial business which under the law of the state can not be conducted in a dwelling house, is not an incident of a dwelling house, nor of a home.

D.

The loss of the personal property was not within the coverage of the policy.

As to personal property it was limited to household furnishings and personal effects owned by William E. Bilquist, or by members of his family, and to a loss only while contained in "the above described dwelling house building" (Tr. 74).

The personal property was neither household furnishings nor personal effects. It consisted of the furniture and equipment of a hotel and a beer parlor. Plaintiffs' Exhibit 4 is a list of the furniture and equipment destroyed by the fire. It is the list attached to the complaint as Exhibit A, as the basis of recovery, and is stated in the bill of exceptions to be a list of hotel upstairs, bath room, rest room, kitchen, lobby, dining room and bar room furniture and equipment destroyed by the fire and filed by the plaintiffs as their proof of loss (Tr. 97).

The record contains no testimony tending to identify any item as personal effects of the insured or members of his family. Beer counters, bars, ranges, and electric water pumps are not household furnishings. The lost property was the equipment of a commercial business—a hotel and beer parlor, and in no sense the furnishings of a household or home. It was acquired with the hotel or bought on the installment plan and paid out of the business (Tr. 100). It was owned jointly by Myhre and Bilquist (Tr. 103), one of whom,

at least, never had any household there.

The approved definition of a household is a number of persons living under the same roof and composing a family.

Words and Phrases, p. 3361.

Arthur v. Morgan, 112 U. S. 495-499.

"The goods and chattels of an innkeeper, consisting of bar furniture and beds for his guests, are not household goods. The beds upon which the innkeeper lodges his guests are the implements of his trade, and all the furniture in a public inn, except so much as may be necessary for the accommodation of the family, is intended for the same purpose."

Commonwealth v. Stemstock (Pa.) 24 Am. Dec. 351-353.

In *Robbins v. Bangor R. E. Co.* 100 Me. 496; 62 Atl. 136-141, upon the question of whether a building was a dwelling house or a boarding house, the court observed that boarders do not constitute a family or any part of it; that a boarding house is none the less a boarding house when used as such, because the boarding house keeper and his family live in it while the business of keeping a boarding house is carried on. It was said that the tenant's business was the keeping of a boarding house and that he had no other substantial business, and that his living on the premises was incidental to the carrying on of the business.

The burden of proof to bring the listed articles within the coverage of the policy by showing that they were household furnishings or personal effects of the insured or members of his family, was upon the plaintiffs.

10 beds, 11 dressers, 10 wash stands, 6 dining room tables with 4 chairs each, a beer counter and bar, dishes and silver ware for the service of 40 persons, 2 refrigerators, an electric water pump, and the miscellaneous equipment of the hotel lobby, dining room, bar and kitchen could hardly be the household furnishings of Bilquist and his wife who occupied only sleeping quarters on the top floor (Tr. 8, 9).

E.

The loss falls outside the coverage of the policy because not contained in a dwelling house building.

In *Johnson v. Franklyn Ins. Co.* 90 Wash. 631; 156 P. 567, the court considered a policy covering goods "all while contained in the frame building while occupied only as a dwelling at No. 30 Franklyn St." At the time of the loss the property was at 2832 Fifth Avenue. Judgment for the insured was reversed on appeal. The court held that the quoted provision was as much of the essence of the contract as any other part of the promise.

There is no distinction in principle between insur-

ance of chattels while located at a particular place and insurance while the building in which they are located retains a particular character.

An insurance company has the right to determine for itself whom and what it will insure and the conditions under which it will insure.

Jump v. North British, etc., Ins. Co. 44 Wash. 596; 87 P. 928.

In the provision of the policy limiting its coverage of personal property to a loss only while contained in the above described dwelling house building, the words "dwelling house" is not merely identification of the building, but is a restriction of the coverage to a loss sustained while the subject matter is contained in the building and while it continues to be a dwelling house.

The term "dwelling house" is to be construed in the light of the subject matter and the purpose for which it is used. In insurance the term "dwelling house" is employed to restrict the risk to the rate. The rate, shown by the policy as $1.925 (Tr. 72), was the same on both real and personal property. The three-year rate on a dwelling was $1.92; the one-year rate $1.10. The rate on a hotel was $3.46 for one year (Tr. 129). The rate for a beer parlor would not be less (Tr. 138).

Where insurance is written upon chattels contained in a dwelling house building at the rate fixed for

dwelling house risks and the owner uses the building for a hotel or beer parlor where the risk is measured by a premium more than three times as great, there is a direct violation of the coverage restriction to a dwelling house building. The purpose of the restriction is to hold the risk in proper relation to the rate.

A fire insurance policy insured household furniture while contained in a certain frame building at a given location, occupied as a store and dwelling. The property was removed to another building at 211 Delaware St. in the same city. An endorsement was placed on the policy by the insurance company to the effect that the insurance was transferred to cover similar property contained in the frame dwelling house at 211 Delaware St. The insured occupied the first floor of this building as a store and the remainder as a dwelling place for himself and family. It was held that the description of the building as a dwelling amounted to an assertion that it was in use as a dwelling house and not to be used for any purpose incompatible therewith, and that the use of part of the building as a grocery store was so far incompatible as to prevent a recovery on the policy.

Greenwich Insurance Co. v. Dougherty 42 Atl. 485, affirmed 46 Atl. 1099; 64 N. J. L. 716.

Appellees may contend that the building was also used for dwelling house purposes, as Bilquist lived there.

One answer is that the coverage was limited to occupation *only* for dwelling house purposes.

The residence of Bilquist and his wife was merely incidental to the operation of the business of conducting a hotel and beer parlor.

In *McCullough v. Northwestern Mut. Fire Assn.* 183 Wash. 5, 48 P. (2d) 217 the contention was raised that the parties conducting a distillery on the premises were also occupying it as a dwelling. The Court said "The tenants devoted the house primarily to the distillation of liquor and not to use as a home. Naturally they lived there, but manifestly the main use of the property was as a distillery" (p. 13).

The record disclosed a purchase of the property because it would be a good place for the Bilquists to make a living (Tr. 100, 105). The main business was serving meals, beds and over week-end guests (Tr. 103). When the hotel was closed in the winter season of 1935-6, the Bilquists went elsewhere. The insured building was to the Bilquists merely a place of business, a place to work. Had there been no work for them there they would not have been there.

It would be equally justifiable to say that the Olympic Hotel in Seattle was occupied only for dwelling house purposes, because its manager occupies parlor, bed room and bath in it.

Occupation by a caretaker is not occupation for dwelling house purposes.

Thomas v. Commercial Assurance Co. 162 Mass. 29; 37 N. E. 672.

A building occupied down stairs as a store and upstairs for living quarters of the owner is not occupied only for dwelling house purposes.

Gallin v. Allemania Ins. Co. 172 N. Y. S. 662.

There can be no recovery without allegation and proof of the occupation of the insured building only for dwelling house purposes at the time of the fire.

Allen v. Home Inc. Co. of N. Y. 133 Cal. 29; 65 P. 138.

F.

Appellees can not plead ignorance of the terms of the policy.

Myhre expected the policy to be held by the mortgagee. Myhre asked Langer for the policy and he gave it to him (Tr. 116). He examined it and said his name did not appear in it (Tr. 121). He had full opportunity to examine the policy and learn its terms. He must

have made some examination to determine that his name did not appear in it.

The law in the state of Washington is that it is the insured's duty to read his policy; and the law says it was done.

Carew, Shaw & Bernasconi v. General Casualty Co. 189 Wash. 329-341; 65 P. (2d) 689.

Perry v. Continental Ins. Co. 178 Wash. 24-26; 33 P. (2d) 661.

Hayes v. Automobile Ins. Exchange 126 Wash. 487-8 218 P. 252.

Rice v. Hartford Ins. Co. 50 Wash. 346; 97 P. 238.

G.

The plaintiffs' action was not one for reformation.

The defendant was entitled to its day in court upon every issue, and was not bound to anticipate issues not set forth in the pleadings.

The pleadings set forth no case for reformation.

There is no allegation as to what terms of the policy are to be reformed, nor what they should be when reformed. There is no offer to do equity by paying the proper premium. The prayer is for money damages and not for equitable relief. The defendant did not set up an equitable defense. The issue of reformation was not presented to nor tried by the District Court. It

was tried upon the law side of the court which granted a recovery upon the policy as written.

Reformation is not incident to an action at law. It can be granted only in equity.

> *United States v. Milliken Imprinting Co.* 202 U. S. 168.
>
> *Invenson v. Hutton,* 98 U. S. 79-82.

To recover upon a coverage different from that of the policy, the issue of reformation should have been set forth in the pleadings, the remedy asked for and the case set to the equity side of the court.

> "The verdict of a jury, where reformation is essential to a recovery, it is not a substitute for the regular practices of a court of chancery to be applied by the District Judge sitting as a chancellor. If the issue of reformation had been involved the proper practice would have been to have transferred the case to the equity side of the court."
>
> *Liberty Oil Co. v. Condon Bank,* 260 U. S. 235.

In a suit to set aside a tax assessment, the Supreme Court of the United States said:

> "So long as we attach importance to the regular forms of procedure we can not sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law presented by the judge, for the usual and legitimate practice of a court of chancery."
>
> *Lindsay v. Shreveport Bank,* 156 U. S. 485-493.

In the Federal courts a written contract can not be reformed in an action at law.

Simpkins Fed. Practice, Rev. Ed. p. 58.
Pitcairn v. Phillip Hiss, 125 F. 110.

The jurisdiction of the courts of the United States under the constitution is "In law and equity."

Sec. 2 Art. III, U. S. Constitution.

The question of whether the right to an equitable remedy shall be determined by the District Judge sitting as a chancellor, or by a jury, is one relating to the organization and jurisdiction of the federal courts, and is not a matter of substantive law, pleadings, or modes and forms of procedure. It is governed by the constitution and the acts of Congress.

The recent case of *Erie Railroad Co. v. Tompkins*, U. S. Sup. Ct. Law Ed. Adv. Op., Vol. 82 p. 787, in no manner affects those powers or limitations conferred or imposed upon the federal courts by the constitution or by the acts of Congress.

Guffy v. Smith 237 U. S. 101-114.

H.

The Federal authorities are in line with those of the State as to the right to recover where the loss is outside the coverage of the policy.

> "Of course if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he can not do is to take a policy without reading it, and then when he comes to sue at law upon the instrument have it enforced otherwise than according to its terms."
>
> *Lumber Underwriters v. Rife* 237 U. S. 605-610.

Mere knowledge by the insurer of conditions which would cause a breach and forfeiture of a policy of fire insurance upon its issuance, does not operate as a waiver or estoppel when the policy contains a provision that no agent, officer or other representative shall have power to waive any provision or condition of the policy, except those by its terms subject to agreement, and then only by waiver endorsed upon or attached to the policy.

Northwestern National Fire Insurance Co. v. McFarlane, 50 F. (2d) 539.

Eddy v. National Union Indemnity Co. 78 F (2d) 545.

Northern Assurance Co. v. Grand View Building Assn. 183 U. S. 308.

Sun Insurance Co. v. Scott, 284 U. S. 178.

Pennman v. St. Paul Ins. Co. 216 U. S. 311.

The Court is not at liberty to introduce a short cut to reformation by letting the jury strike out a clause.

Lumber Underwriters v. Rife, 237 U. S. 605-610.

Under the law and the evidence no verdict for the plaintiff could have been returned without disregarding the clause of the policy limiting the coverage to an occupation only for dwelling house purposes.

II.

The use of the insured premises for selling beer and wine and for public dancing increased the hazzard.

The question arises upon the third and fourth assignments of error. They present the identical defense of a policy made void by an increase of hazard.

The third assignment is as follows:

> In denying the defendant's motion, made at the close of the plaintiffs' evidence and renewed at the close of all the evidence, that the court direct the jury to return a verdict for the defendant because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which the plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the meaning and intent of the provisions of the said policy in that the entire policy

shall be void unless otherwise provided by agreement endorsed upon or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto (Tr. 154).

The fourth assignment is as follows:

In denying the defendant's motion that the court enter a judgment for the defendant, notwithstanding the verdict of the jury, because it appears from the uncontradicted evidence that subsequent to the issuing and delivery of the policy of insurance, for recovery under which plaintiffs sue, the plaintiffs caused to be installed in the insured building a bar and apparatus for the dispensing of beer, and that from about April 1st, 1936, thence continuously until the destruction of the insured building by fire, the said insured building was by the insured, and with the knowledge and consent and under the control of the insured, and without the knowledge or consent of the defendant, used and occupied in part as a beer parlor and place for the public vending and sale of beer and wine and as a place for public dancing, which said use and occupancy increased the hazard of the insurance within the intent and meaning of the express provisions of said policy in that the entire policy shall be void, unless otherwise provided by agreement endorsed upon said policy or added thereto, if the hazard be increased by any means within the control or knowledge of the insured, and that no agreement otherwise providing had been endorsed upon such policy, nor added thereto (Tr. 155).

The policy covered the insured building only when used for dwelling house purposes, and contained a provision that the entire policy should be void, unless oth-

erwise provided by agreement endorsed thereon or added thereto, if the hazard be increased by any means within the knowledge or control of the insured (Tr. 80).

The use of the property as a place for the sale of beer and wine to the public and as a place of public dancing within the knowledge and control of the insured from April 6, 1936, to the time of the fire, was admitted.

Appellees attempted to avoid the provision of the policy, and the forfeiture, by the contention that the use was known to the defendant's agent, Langer and that it did not create an increased hazard.

—A—

The claim of Estoppel based upon the agent's knowledge failed for want of proof.

Langer made no endorsements on the policy that waived any of its provisions (Tr. 121). He was not there after the place was turned into a beer parlor and had no knowledge of how they conducted their business. He never permitted them to open a beer parlor on the premises (Tr. 123).

Myhre said that the beer parlor was operated to the time of the fire. He knew they were selling beer (Tr. 101).

Bilquist said that he made the arrangement with Moen for the beer and wine concession, dividing the profits (Tr. 108). Beer was served in the dining room (Tr. 109). He told Myhre they were going to put it in, but did not tell Langer (Tr. 109).

Langer's knowledge is not shown. After delivery he did not represent the company with respect to the policy, unless he was called upon to take some action concerning it.

Moller & Niagara Fire Ins. Co. 54 Wash. 439-103 P. 449.

—B—

The denial of the motion for a directed verdict and the denial of the motion for a judgment notwithstanding the verdict was error because the uncontradicted evidence showed an increase of hazard, over that assumed under the policy, arising from the use of the premises for selling beer and wine.

The increase of hazard being established by uncontradicted evidence, there was no issue for the jury.

Gunning v. Cooley, 281 U. S. 90.

Whether the evidence is sufficient to require submission of a case to a jury when tried in the Federal courts, is a question to be determined according to the rules laid down in those courts. When the evidence up-

on any issue is all on one side, or overwhelmingly so as to leave no room for doubt as to what the fact is, the court should give a preemptory instruction for a verdict.

Peoples Savings Bank v. Bates, 120 U. S. 556-562.

Southern Pacific Co. v. Pool, 160 U. S. 438.

Slocum v. New York Life Ins. Co. 228 U. S. 364-369.

Chicago Milwaukee & St. Paul Ry. v. Coogan, 271 U. S. 472-478.

Gunning v. Cooley 281 U. S. 90.

There is no question of credability of witnesses. They did not differ as to the existence of an increased hazard. Appellant's witnesses were not interested, nor were they its employees. Their testimony was not contradicted by that of any other witness, nor brought in question by cross examination nor by the admitted facts of the case.

Chesapeake & Ohio Ry. Co. v. Martin 283 U. S. 209.

The only purpose served was to permit the jury to discredit these witnesses, and find the fact contrary to their testimony without evidence to sustain its finding.

The increased hazard was shown by the following testimony.

Allan V. Kelly, an insurance adjuster with 10 or 15 years experience and having an independent adjustment business, testified that assuming that the hotel had been conducted as a seasonal hotel for guests, or as an inn where meals and lodgings were furnished, and a bar, bar room and piano player were placed in the property the hazard would be considerably increased (Tr. 137).

Leonard L. Edwards testified that he was associated with McCollister and Campbell and had charge of fire insurance (Tr. BE 35); That the installation of a bar room and dance hall and bringing in an outsider to conduct the bar room would increase the risk (hazard).

Both of these men were experts in the matter of insurance and qualified to express an opinion. Their competency was not challenged.

It is increased hazard that makes increased rates. The Washington Surveying and Rating Bureau, conducted under the supervision of the insurance department of the State, fixes the classification and rate for all property to be insured, and the classification is according to the hazard, and the rate varies as the hazard varies.

The provision that the policy shall be void in case of an increase of hazard is designed for the legitimate

purpose of preventing an insured from taking out a policy at one rate and devoting the insured property to a use that commands a higher rate.

The fact that the one year rate on a dwelling is $1.10 and on a hotel $3.46 (Tr. 129), and on a road house dance hall and beer parlor, $5.00 per year, less a 30% deviation, but not less than the $3.46 rate (Tr. 137-138), conclusively shows an increase of hazard attending the occupation for a beer parlor over the hazard assumed by the policy.

The testimony relied upon as rebutting the testimony of the existence of an increased hazard is not directed to showing that there was no increased hazard. No witness testified that there was no increased hazard.

Such testimony tended only to show:

That no stoves or electrical apparatus was installed with the bar or the beer parlor, and no oil or combustibles were kept in the bar room; that the fire when discovered was coming from the opposite end of the building from the beer parlor and that there was no fire in the bar room at the start; that persons who frequented the place were orderly and that there was an absence of rowdyism around the place; that there were plenty of ash trays and trash was not thrown around.

The trial court should have held as a matter of law that a change from an occupancy only for dwelling house purposes, carrying a premium rate of $1.10 per year, to an occupancy for a commercial business including the sale of beer and wine to the public and the use of the place for public dancing, carrying a rate of $3.46 per year, or more, was an increase of hazard.

The testimony relied upon as creating an issue of fact for the jury does not tend to deny the existence of an increased hazard, and tends to show nothing more than that the appellees violated the terms of the policy in a cautious, careful and prudent manner.

It is unimportant that the increased hazard may not have caused the fire nor contributed to the loss.

Allen v. Merchants Fire Assurance Corp. 179 Wash. 189; 35 P. (2d) 54, was a case where a building was insured while occupied only for dwelling house purposes, with a clause in the policy making the entire policy void, unless otherwise provided by agreement endorsed upon or attached to the policy, if the hazard be increased by any means within the control or knowledge of the insured. The policy and a deed under a contract of sale from Allen to Albert Commellini were in escrow with a bank which was also the agent of the insurance company and wrote the policy.

Allen notified the insurance department of the bank by letter when possession was delivered to Commellini, and later gave notice to the escrow department of the bank of Commellini's purpose to use the insured building for the purpose of carrying on the business of selling Italian dinners to the public. Holding that a notice to the escrow department was insufficient, and mentioning the fact that Allen gave notice to the Insurance Department when possession was actually changed, the Court said:

> "*But, unfortunately, he did not give that department notice of the change of use from that of a dwelling house to that of a place of public entertainment which would increase the risk and the rate.*" (p. 194). (Italics ours).

A change from an occupation for dwelling house purposes only to an occupation as a place of public entertainment, involving a greatly increased premium rate, is as a matter of law, an increase of hazard within the meaning of that term as used in the policy.

III.

The District Court erred in including in its judgment interest upon the amount of recovery allowed by the verdict covering a period of one year antedating the return of the verdict.

The question arises upon the tenth assignment of error, which is as follows:

> In rendering judgment against the defendant for interest upon the amount of the recovery allowed by the verdict of the jury from February 1st, 1937, and covering a period prior to the date of the judgment and prior to the time of the return into the court of the verdict of the jury on February 1st, 1938; no separate recovery of interest having been allowed in such verdict, and the recovery of interest not having beeen claimed in the complaint. (Tr. 159).

The verdict was returned February 1st, 1938, and the judgment carried interest from February 1st, 1937.

The law of Washington allows interest on unliquidated claims only from the date of judgment.

> *Locomotive Exchange, Inc. v. Rucker*, 106 Wash. 278; 179 P. 859.
>
> *Jellum v. Grays Harbor Fuel Co.* 160 Wash. 585-593; 295 P. 939.

Interest to be recoverable must be ascertainable by mere computation.

> *Wright v. Tacome*, 87 Wash. 334; 151 P. 837.

A fire insurance policy is a contract of indemnity. It undertakes only to pay the loss sustained to an amount not exceeding that stated in the policy. The amount of loss depended upon the values of the personal property, which could be established only by evidence of value; and therefore the claim was an unliquidated one.

The plaintiff's complaint did not ask for interest.

It can not be determined with certainty that the verdict did not include interest.

If the appellees should recover interest antedating the verdict, it will be presumed that the verdict includes it. The contrary can not be established with certainty. The jury was not bound to accept the valuations placed upon the personal property by the plaintiffs.

There is no principle of law more firmly established than that the judgment must conform to the verdict.

It is error to give judgment for interest in addition to the amount of the verdict.

Minot v. Boston 201 Mass. 10; 86 N. E. 783.

Miller v. Farmers Mutual Ins. Co. 199 N. C. 594; 155 S. E. 254.

Butte Electric Co. v. Matthews, 96 Mont. 491; 87 P. 460.

Southern Kansas Ry. v. Showalter, 57 Kas. 681; 47 P. 830.

> "The judgment of the court must follow the verdict where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and there is nothing to indicate that the jury omitted interest. It will be presumed that it is contained in the amount of their finding, and the court can not add interest to the verdict."

Wyant v. Beavers, 63 Okla. 68; 162 P. 732.

The question was not reserved and there is nothing to indicate that the jury overlooked it.

The judgment of the District Court should be reversed and judgment entered for the defendant, or remanded with direction to enter such a judgment.

Respectfully submitted,

DAVIS AND GROFF,
Attorneys for Appellant.

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLEES' BRIEF

RAY R. GREENWOOD,
H. SYLVESTER GARVIN,
Attorneys for Appellees.

Office and Post Office Address:
201 Bremerton Trust and Savings Bldg.,
Bremerton, Washington.

FLETCHERS PRINT - BREMERTON

INDEX OF SUBJECT MATTER

INDEX OF AUTHORITIES

U. S. SUPREME COURT CASES

WASHINGTON STATUTES

SESSION LAWS

In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLEES' BRIEF

STATEMENT OF THE CASE

The following statement is not intended to dispute the statement of the case contained in appellants' brief, but is only to add thereto and call to the attention of the court matters in evidence which appellees deem important.

The policy of insurance upon which this suit is

brought was written by F. E. Langer, an authorized agent of appellant, licensed pursuant to the laws of Washington. Langer had been for twenty years a banker at Port Orchard, Washington, made loans upon property, and in connection therewith wrote insurance. Prior to writing the insurance in question he inspected the Manchester Inn and appraised it. He knew it was an inn and knew that it was so used; also that it was not to be used exclusively as a dwelling when he placed the policy of insurance thereon. Langer's bank and insurance office were one and the same place of business. His bank held a mortgage on the property and the policy was kept in his possession, as President of this bank in the same place of business where the insurance was written. Langer had recently, before the date of the policy, accepted the mortgage and knew both the Myhres and the Bilquists and was fully aware and had direct knowledge of their interest. He had discussed with Myhre the matter of placing Bilquist in this inn and was thoroughly cognizant of all the facts and circumstances pertaining both to the nature of the property, both real and personal, its proposed use, occupancy, and ownership. No application for this insurance was made, the agent simply undertook to insure it according to his own idea. After he had done so he drew the premium from Myhre's bank account.

The so-called beer parlor consisted only of a short

bar installed in one corner of the dining-room with room for six stools in front of it. (Tr. 103). No fire producing apparatus was placed in the building in connection with the beer apparatus and the fire itself origniated in the basement of the building, in the opposite corner from where the dining-room was situated, in the night long after closing hours.

ARGUMENT

In this case the appellant misconceives the theory on which the appellees proceeded, namely,—the theory of estoppel. Appellees say they made no representations whatsoever, but that the company, by its agent, gathered its own information and wrote its own policy. That the agent of the appellant had full power and authority to write a policy upon the property covered, and the appellant, having given him that power, is estopped to say that his mistake in describing the property insured can now be made the basis of a defense to this action.

WASHINGTON DECISIONS CONTROL IN THIS CASE

In addition to the case of *Erie Railroad Company vs. Tompkins,* Sup. Ct. Adv. Op. Law Ed. Vol. 82, p. 787, the Supreme Court of the United States again in the case of *Ruhlin vs. New York Life,* Vol. 82, Law Ed. No. 16, p. 823, decided on May 2, 1938, holds that federal courts

in dealing with questions of general commercial law, such as the construction of contracts of insurance, are bound to follow the decisions of the appropriate state court, and that this rule applies though the question arises either in an action at law or a suit in equity.

DEFINITION OF AGENT

Rem. Rev. Stat., 7033 (P. C. 2909), defining certain insurance terms, provides:

> " 'Agent,' 'insurance agent' or 'local agent' is a person, copartnership or corporation, duly authorized and commissioned by an insurance company, to solicit applications for and effect insurance in the name of the company, and to keep a complete record of all such transactions, and to discharge such other duties as may be vested in or required of the agent by said insurance company."

It is unlawful for an insurance company admitted to do business in this state, to write, place, or cause to be written or placed, any policy of insurance except through a duly authorized agent. Rem. Rev. Stat. 7080 (P. C. 2943).

In the case at bar, the agent Langer was a duly authorized agent and licensed under the laws of the State of Washington, (Tr. 115). In writing this policy his principal was undisclosed to the appellees. He asked for the business, testified he knew the property, (See Tr. 117 and 124 and 125), chose the form of policy, and placed

it in his bank with the mortgage he had written upon the property. (Tr. 115).

KNOWLEDGE OF THE AGENT IS IMPUTED TO THE PRINCIPAL

In the case of *Gaskell vs. Northern Insurance Company,* 73 Wash. 668, 132 P. 643, the agent wrote a policy on the separate property of the wife but by mistake wrote it in the name of the husband. The agent testified that he knew the true ownership of the property "but unthinkingly" wrote it in the wrong name. The Court held that such knowledge bound the principal and that the policy in an action at law would be deemed to be reformed and enforced as it was written. This doctrine was followed in the case of *Harper vs. Fireman's Fund Insurance Company,* 154 Wash. 77; 280 P. 743.

That case is in many respects parallel to this case in that the insurance agent was well acquainted with the plaintiff's business and for many years placed insurance on his lumber yard. The policy contained a clear space provision, namely: that there was to be maintained a clear space of 300 ft. between lumber and structures. This would have necessitated an increased rate of $3.27. No representations were made by the assured and the agent undertook to insure the lumber and fix the rate. When the fire occurred the policy was operative under the lesser

rate, yet the Court held that the agent attempted and intended to cover the particular lumber destroyed. They charged the premium fixed by the rating bureau to respondent's bank and collected the premium they deemed proper. The agency thus did not exceed its power but simply made a mistake and charged a lower rate to cover the risk when it should have written and delivered a different form of policy and charged a different rate. The court held, all facts having been disclosed and all conditions known, the knowledge of the agent was the knowledge of the principal and the mistake in the form of the policy should be charged to the company.

In *Miller vs. United Pacific Casualty Company,* 187 Wash. 629, 60 P. (2d) 714, this doctrine is again followed. In that case the agent undertook to transfer the policy of insurance from one automobile to another, owned by a different party, and did so by simply attaching a rider. Although the policy did not run to the owner of the car and although the policy on its face provided that it could not thus be transferred the Court held that the agent acted on his own initiative and did in an improper manner what he intended to do, namely: Cover this particular car, and at p. 638 states as follows:

> "The minds of the parties had fully met upon what the coverage was to be, and the contract was closed upon that understanding. It was never con-

templated by the parties that they should execute an abortive or illegal contract."

And likewise on page 638 the Court quotes from 2 Mechem on Agency (2nd ed.) 1397, 1813, which was the rule followed by the trial court in this case and upon which the jury were instructed.

ESTOPPEL

In each of the above cases cited up to this point in this brief, the Court held that the mistake of the agent was the mistake of the company and when they accepted the premium which was fixed by their own rating bureau they were estopped to deny the legality of the policy.

In the case of *Gattavara vs. Gen. Ins. Co. of America,* 166 Wash. 691; 8 P. (2d) 421, which was an action at law tried by a jury where the policy was issued to the plaintiff as owner of a truck, whereas his interest was only that of mortgagee, the company defended on the ground that the interest of the assured was other than an unconditional and sole ownership. The reply was that the company's agent knew what the interest of the assured was and through mistake and neglect failed to properly place it in the policy. The Court held that the question of whether the agent knew of the nature of the assured's interest was a question to be submitted to the jury and that since the company received and

retained the premium it was estopped to deny liability. Citing the case of *Reynolds vs. Canton Insurace Company,* 98 Wash. 425; 167 P. 1115, when an insurance policy was issued on a vessel which was to sail beyond limits restricted in the policy. The issue was whether or not the agent knew where the vessel was to go when he wrote the policy and in that case again the Court held that the company was estopped to deny liability.

This doctrine of estoppel relative to insurance policies, where the agent writes and delivers a policy which on its face is contrary to known existing facts, has been the rule of the Supreme Court of Washington from the beginning.

In an earlier case of *Turner vs. American Casualty Co.,* 69 Wash. 154; 124 P. 486, where an agent wrote an accident policy after the assured had fully disclosed to him certain physical ailments, the Court at P. 160 uses the following language:

> "We are not unmindful of the fact that the federal courts and other courts have taken a contrary view. The substantive justice, however, of the view taken by this court from the beginning cannot be doubted. It gives notice to the insurance companies that they cannot turn loose upon the people a horde of incompetent or dishonest agents to exploit the policy holder, and then avoid the consequence of their acts by seeking refuge behind adroitly worded contracts."

In the case of *Stebbins vs. Westchester Fire Insurance Co.,* 115 Wash. 623; 197 P. 913, where the owner did not have clear title to the property insured, the Court again stated at P. 627:

> "It has also generally been held that, where an insurance agent issues and delivers a policy of insurance, which contains forfeiture clauses contradictory to the facts known to him at the time of the issuance of the policy, the company so issuing the policy will be held to have waived such inconsistent provisions and is estopped to defend by virtue of them."

REFORMATION NOT NECESSARY

We contend that this is an action at law, but under the rule of the state courts of Washingon if it be one of equitable cognizance, still the verdict of the jury is advisory and the judgment of the court should be in accordance with the findings of the jury.

In the case of *Miller vs. United Pacific Casualty Company,* 187 Wash. 629; 60 P. (2d) 714, a case hereinabove referred to, the court holds at p. 641 that it would be idle to remand the case for the mere formality of reformation. That such an agreement can and should be reformed and enforced in one proceeding. Likewise in *Gaskell vs. Northern Insurance Company,* 73 Wash. 668; 132 P. 643, where the complaint did not ask for reformation but alleged that appellant had notice and knowledge of the facts involved, stated at p. 676 that even though no de-

cree of reformation was entered the appellants were not prejudiced by it; and further on page 676 state as follows:

> "Authority is not wanting to the effect that, under the conditions here presented, a policy should be enforced wihout reformation on the ground that the husband took it as agent or trustee for the wife."

The case of *Carew, Shaw, etc.,* 189 Wash. 329; 65 P. (2d) 689, is not authority in support of appellants' contention for the reason that in that case the action was brought to reform and enforce the provisions of a policy in order to extend the coverage to something other than the thing insured by their contract. They had insured against burglary to an inner safe. The plaintiffs there attempted to collect for a loss of property in an outer safe, claiming an oral agreement to thus extend the terms of the policy. Plaintiffs' alleged mistake and fraud and recovered a verdict. The lower court entered judgment notwithstanding the verdict and in doing so apparently found that there was no mistake and no fraud. The court at p. 339 states as follows:

> "The trial court was in a better position than we to determine the credibility of the witnesses. The testimony was conflicting. In granting the motion for judgment non obstante veredicto and in entering the judgment of dismissal, there can be no conclusion other than that the trial court was of the view that mistake or fraud was not shown."

The supreme court holds with the lower court that mistake or fraud had not been shown by a clear, cogent, and convincing testimony. It follows therefore that this case in effect does not hold that a verdict could not have well stood had mistake or fraud been proven by that degree of evidence required by law.

In the case at bar no attempt was made by the appellees to show that anything was insured excepting the building covered and situated upon the numbered lots set forth in the policy or any other furniture than that contained in the same building. Neither did we attempt to show any other agreement than that contained in the policy. We did not attempt to extend the claim to some other lot or to property which may have been removed to some other building, which would be a case comparable to the case relied on by appellants.

Referring to the policy itself (See Tr. 77) it would seem that the designation of the property is intended to be considered as a warranty only, because, as set forth therein, it refers to the previous provisions of the policy and states that they are conditions which cannot be waived except by an officer of the company and in writing. Again, in the policy itself—(See Tr. 83) it is stated that:

> "If an application, survey, plan, or *description* of property be referred to in this policy it shall be a part of this contract and a warranty be the insured."

In other words, it is a warranty which can be waived. As above stated, the cases relied on by appellants are cases where it is attempted to show that something other than that contained in the policy was insured; that is, some other thing or the same thing at some other or different location. That would, of course, be an attempt to extend the policy and change the essential undertaking of the company.

In *Gattavara vs. Gen. Ins. Co. of America,* 166 Wash. 691; 8 P. (2d) 421 heretofore referred to, the Court held that an action of this kind is an action at law and at p. 695 states to the effect that even if it were an action of equitable cognizance still, it was discretionary with the trial court to submit that issue of fact to the jury. It will be noticed in this case that there was no prayer for reformation, and at p. 697 the court states that if there was a mistake in writing the policy and the agent had knowledge of the facts and the company failed to return the premium and the jury so found by its verdict, then the respondent was entitled to recover without reformation of the policy on the principal of estoppel and waiver.

Counsel cite the case of *Reynolds vs. Pacific Marine Fire Ins. Co.,* 98 Wash. 362; 167 P. 745, as authority for their position that estoppel cannot apply in cases of this kind. Singularly, the boat Arnold had three insur-

ance policies upon it, resulting in three separate cases which were passed upon by the supreme court of this state.

Reynolds vs. Canton Ins. Office, 98 Wash. 425; 167 P. 1115;

Reynolds vs. Pacific Marine Ins. Co., 105 Wash. 666; 178 P. 811.

In each of these cases the policies were identical and the loss was one and the same. In the case cited by counsel, 98 Wash. 362; 167 P. 745, there was a marginal notation warranting that the boat would not sail in certain waters. For the purpose of the appeal in that case it was admitted that the marginal clause was inserted with the authority and permission of the assured. We have in this state a statute which is found in Chapter 49, Laws of 1911, p. 197, and, as amended, is now carried forward to Rem. Rev. Stat. 7078, which states that no oral misrepresentation or warranty made in the negotiation of a contract or policy of insurance shall be deemed material or avoid the policy or prevent it attaching unless such misrepresentation or warranty is made with intent to deceive. The question therefore, presented to the court, was whether the rider limiting the waters in which the ship might sail was a warranty in contemplation of this statute or an *essential part of the contract.* The court

held that it was an *essential part of the contract* and that the plaintiff below could not recover.

In the next case, being the Canton case, found at 98 Wash. 425; 167 P. 1115, involving the same boat, the same loss, and the same restriction, the court found that where the assurer knew where the boat was going they were estopped to deny liability. This was an action befor a jury upon the policy *as written.*

The next case, being found at 105 Wash. 666, was a case where a broker took the application of the agent of the plaintiff below and procured the insurance from another agency. The court held therefore that the agent of the insurance company did not have knowledge where the boat was going because the broker acted as the agent of the owners and his knowledge was not imputed to the agent of the insurance company, therefore, the company was not estopped to set up the defense alleged, namely: that the boat had left the waters in which it was insured.

The court distinguishes this case from the Canton case and on p. 674 states:

> "Much reference is made in the briefs to the case of *Reynolds vs. Canton Ins. Co.,* above referred to, but in that case, as already pointed out, Waterhouse & Company was the agent of the company in writing the policy upon which the action was based, while

here it was a broker. There Waterhouse & Company, the agent of the insurance company, knew, or at least the jury had a right to find that it knew, that the boat was contemplating a voyage that would take it to the waters of Southwestern Alaska, and that its owners desired the insurance to cover it while in those waters."

Thus it will be seen that although the court has held this same provision to be an *essential part of the contract* in one case yet they have likewise held that the company may be estopped by knowledge of the facts which existed when they wrote the policy and took the premium in another.

THE QUESTION OF WHETHER OR NOT THE RISK WAS INCREASED BY THE SALE OF BEER AND WINE IS A JURY QUESTION

Counsel relies upon Washington cases, claiming that the Washington supreme court has decided that the changing of a dwelling into a roadhouse is a change in the use of the business.

There is no evidence here that a dwelling was changed into a roadhouse, but on the contrary that a hotel was conducted as a hotel and secured a license to engage in the lawful business of serving wine and beer to its patrons in connection with its general operations as any hotel.

The case of *Allen vs. Merchants Fire Insurance Com-*

pany, 179 Wash. 188; 36 P. (2d) 545, is not in point. In that case a dwelling house, insured as such, was changed into a public roadhouse, and the court held that inasmuch as notice of the change was given only in the escrow department of the bank and not to an agent of the company was not sufficient notice to the company. Further, the evidence was that the building was no longer used as a dwelling at all, but simply as a roadhouse.

Likewise the case of *Clark vs. Western Insurance Company,* 168 Wash. 366; 12 P. (2d) 408, relied on by counsel, was a place where a house was used exclusively to manufacture intoxicating liquor unlawfully, and that the fire resulted from an explosion in connection with a heating apparatus for the still.

The case of *McCulloch vs. Northwestern Mutual Fire Assn.,* 183 Wash. 5; 48 P. (2d) 217, is likewise a case where a dwelling house was used entirely as a place to manufacture intoxicating liquor. None of these cases are compatible with the facts in the present case.

On the contrary, the controlling law relative to the present case can be found in the case of *Ragley vs. Northwestern Nat. Ins. Co.,* 151 Wash. 545; 276 P. 537, where the court refused to grant judgment as a matter of law and instructed the jury that if they found the manufacture of intoxicating liquor was one of the principal uses of

the house, then the verdict must be found for the defendant.

See Insruction given by court, p. 548.

Further, discussing the question the court states:

> "When we consider the great number of uses which may be made of a house, and things which may be done therein incident to its occupancy as a home, it at once becomes apparent that the words "occupied only for dwelling-house purposes" are not capable of very exact meaning or application. We are of the opinion that the trial judge correctly instructed the jury, and correctly refused to give the unqualified instruction requested by counsel for appellant." (P. 548).

Likewise in the case of *Ada L. Hartman vs. Farmers Insurance Co.,* 163 Wash. 490; 1 P. (2d) 913, where a chicken brooder had been installed in the house but the evidence showed the fire had originated in another part of the house and that it did not actually increase the hazard. The court states:

> "Clearly, then, the court could not say, as a matter of law, the installation and use of the oven had increased the fire hazard. Therefore, the question became one of fact to be determined by the jury under proper instructions, and hence the court properly denied the motion for a non-suit." (P. 493).

It must be remembered that the business of selling wine and beer under the law of the State of Washington is a lawful business and not akin to running a still which

carries with it the fact that it is illegal and the fact that it is a dangerous fire hazard. In inquiring from the witnesses, to-wit: the adjuster and general agent as to the probability of increasing the misk, counsel assumed that this place was a public roadhouse and asked their opinion based on no knowledge of the facts surrounding the place itself. It is respectfully submitted that this was not a subject whereupon opinion evidence can properly be received. It was a fact to be decided by the jury upon the evidence produced in the light of all the surrounding circumstances testified by the witnesses upon each side of the case. It must be remembered that the appellants did not insure a dwelling but insured the building for the uses and purposes for which it was being used and was intended to be used, and inasmuch as they are estopped to deny the validity of this contract then likewise they are estopped to claim that the building should have been used for dwelling-house purposes only.

Counsel assumes throughout his brief that the testimony of the defense witnesses on the question of whether the risk was increased or not stands uncontradicted. We call attention to the testimony of Bessie Bilquist (Tr. 103), stating that the main business was serving meals, banquets, and renting rooms to week-end guests. Likewise (Tr. 104) that no additional fire hazard was created

by the addition of the beer bar. That the place was conducted no differently than before. See also testimony (Tr. 107). That the fire occurred on the opposite side from where the beer parlor was situated. To the same effect see (Tr. 108, 110); likewise testimony (Tr. 113), witness Nelson: that there was no trash around and plenty of ash trays were used. Testimony of the plaintiffs, taken altogether, shows the place to have been a quiet, orderly place. The little beer bar with six stools was not a principal part of the business but a minor addition, and appellant was not entitled to have an instructed verdict thereon.

INTEREST WAS PROPERLY ALLOWED

Appellant in his tenth assignment claims error in the allowance of interest. Appellees' complaint alleged that on the 3rd of December, 1936, the Proof of Loss was filed (Tr. 5). This was admitted. Under the terms of the policy no suit or action could properly be maintained until sixty days had elapsed thereafter. However, on December 17, 1936, the Proof of Loss was rejected (Ex. "B," Tr. 10). In allowing interest from February 6th the Court gave plaintiffs the benefit of the sixty-day period, which, in our opinion, they should not have had. Where no interest is fixed, the rate in the State of Washington is six per cent. (Rem. Rev. Stat. 7299).

The allowance of interest was never objected to in the court below, nor does the record show that this matter was raised or argued at all. It rather appears that it was an agreement of counsel that it was correct.

Under the law of Washington, insurance on real estate in cases of total loss must be paid in the full amount of the policy. In other words, we have a valued policy. See Rem. Rev. Stat. 7151.

It is true that the assured is only entitled to recover actual value for furniture destroyed. However, a list of furniture was attached to the complaint with its valuation. (See Tr. 8-9). When this list was introduced in evidence (Ex. 4, Tr. 97) the value was fixed at $1871. No issue was made of this value and no objection entered to the introduction of this evidence. The value of the equipment exceeded by $371 the amount of the face of the policy. The lower court allowed interest on the full amount of the policy without any argument or objection on the part of counsel.

The whole defense in this case was based upon the illegality of the contract, not upon any question as to the value of the property. Interest is recoverable upon all amounts that are capable in the ordinary way of correct ascertainment and this is true even as to an unliquidated

claim. *Yarno vs. Hedlund Box & Lbr. Co.,* 135 Wash. 406; 237 P. 1002.

Appellants' only question is as to the right to interest on the value of the furniture. This never having been in dispute or made in any way an issue it would follow that their claim is unfounded.

The judgment should be affirmed.

Respectfully submitted,

RAY R. GREENWOOD,
H. SYLVESTER GARVIN,
Attorneys for Appellees.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF

DAVIS & GROFF,
(William Hatch Davis)
(Guy B. Groff)
Attorneys for Appellant.

Office and Post Office Address:
1333 Dexter Horton Building,
Seattle, Washington.

SHEPARD PRINT, KE. 4934

INDEX OF SUBJECT MATTER

INDEX OF AUTHORITIES

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

DEFENSE NOT BASED ON MISTAKE IN DESCRIPTION

The argument that the appellant is estopped to say that the agent's mistake in describing the property insured can now be made a defense to this action is at

least an inaccurate statement of the character of the appellant's defense. (Answer brief, p. 3).

The description of the property insured is: "The two-story, shingle roof, frame building, and additions in contact therewith, situate on Lots 1 and 2 of Block 4, and Lots 8 and 9 of Block 5, of Davis Addition to Manchester, Washington." Pltf. Ex. 1 (Tr. 73).

The description of the property, so far as we know, contains no mistake, and no mistake of description has been or is now asserted as a defense.

The defense is not based upon description of the property insured, but upon the fact that the insured property was not being used in such a manner as to bring the loss within the appellant's undertaking.

Notwithstanding that the undertaking of the appellant was to insure the property while occupied only for dwelling house purposes (Tr. 72), the appellees used it for a hotel and as a place for the vending of beer and wine. Upon this the appellant bases its defense. This is not a matter of description.

II.

IMPUTING AGENT'S KNOWLEDGE TO PRINCIPAL

We have no quarrel with the general statement that knowledge of an agent is imputed to his principal; but

that principle has no application in this case. The loss not being within the coverage of the policy, there could be no recovery on the policy even had it been written by the executive officers of the company having all the knowledge the agent in this case is shown to have possessed. Where there can be no recovery on a contract without reformation, it can make no difference whether knowledge of the existence of claimed facts is derived by the insurer by direct information or by imputation of law.

III

ESTOPPEL — REFORMATION

The brief of appellees would indicate that their counsel has failed to recognize the fact that the decisions of the Supreme Court of Washington divide the defenses which have been made to policies of insurance in the cited cases into two classes:

First. Where the defense is that the policy has become forfeited by a breach of a warranty or condition thereof and is no longer in force and effect.

Second. Where the defense is that although the policy be in full force and effect, yet the plaintiff may not recover thereon, because the loss is not within the undertaking of the insurer—sometimes expressed as not being within the coverage of the policy.

Of the first class, are the following cases cited by appellees: *Gattavara v. General Ins. Co. of America*, 166 Wash. 691, 8 P. (2d) 421, cited on page 7 of the answer brief, where the defense was upon a warranty of sole and unconditional ownership; *Turner v. American Casualty Co.*, 69 Wash. 154, 124 P. 486, cited on page 8 of the answer brief, where the defense was the breach of a warranty of sound condition; *Stebbins v. Westchester Fire Ins. Co.*, 115 Wash. 623, 197 P. 913, cited on page 9 of the answer brief, where the defense was that the policy was void because the interest of the insured was not truly stated, and increase of hazard (p. 625); all of which forfeited the policy.

Of the second class, are the cases of *Carew, Shaw and Bernasconi v. General Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689; and *Charada Inv. Co. v. Trinity Universal Ins. Co.*, 188 Wash. 325, 62 P. (2d) 722. In these cases the defense did not rely upon a forfeiture of the policy, but relied upon the defense that the loss was not within the defendant's undertaking under the policy.

The essential distinction between the two classes of cases is that in case of a defense which entails a forfeiture of the policy because of a breach of an undertaking of the insured that certain conditions exist, or shall not exist, such as sole and unconditional owner-

ship, no other contract of insurance, increase of hazard, incumbrance by chattel mortgage, etc., and that a breach shall make the policy void, then, where the true facts were known to the insurer, it may be prohibited from forfeiting the policy under the doctrine of estoppel; but where the defense does not seek to forfeit the policy, and, admitting its continued existence, it appears that payment of the loss is not within the insurer's undertaking, recovery may be had only in case the policy is so reformed as to bring the loss within the terms of the insurer's undertaking.

Where recovery can not be had under the policy as written—and it can not be had here, because the coverage is limited to an occupation only for dwelling house purposes—and the insured claims that the policy does not state the true contract, reformation is the only relief possible.

Carew, Shaw and Bernasconi v. General Casualty Co., 189 Wash. 329, p. 335; 65 P. (2d) 689.

The case of *Harper v. Firemans' Fund Insurance Co.*, 154 Wash. 77, 280 P. 743, was a case falling within the first class. The policy insured lumber in a lumber yard. There was no restriction upon the coverage, as in the case at bar where the property is covered only while used for a particular purpose. The policy contained a warranty of a clear space of 300 feet

around the lumber. This clear space was not maintained, and the policy, if there had been nothing more, would have been subject to forfeiture. Before the fire the insured was notified that the rate would be raised from $2.00 to $7.20, which was the applicable rate where there was no 300 foot clear space. The court says that the evidence clearly warrants the conclusion that the $7.20 rate was by agreement thereafter to be charged, and that it was the intention of the insured to pay the proper rate and obtain a policy which would protect him in case of loss if the 300 foot clear space was not maintained.

This case is clearly an instance of the application of the doctrine of estoppel to prevent the enforcement of a forfeiture, and not a case of allowing a recovery contrary to the coverage of the policy.

The case of *Miller v. United Pacific Casualty Ins. Co.*, 187 Wash. 629, 60 P. (2d) 714, cited on page 6 of appellees' brief, aside from the question of forfeiture because of a warranty of unconditional ownership, which was held unenforceable because there was no intent to deceive, is purely and solely a suit to reform the contract to meet the agreement of the parties and to recover upon the reformed contract. In the prayer of the complaint the insured asks for reformation of the policy to cover the true intent of the parties.

We have never contended that if the policy in the case at bar did not express the true agreement of the parties, it could not be reformed, unless to reform it would make of it a prohibited contract. We do contend that it can not be reformed in a proceeding where the issue of reformation is not raised.

The defendant was not bound to meet any issue not raised by plaintiffs' complaint. It had as much right to meet and defend the issue of reformation—not only whether it should be reformed, but how it should be reformed—as it had to meet the issue of execution and delivery and the amount of liability thereunder.

The complaint in the case at bar does not ask for reformation. It contains no allegation of how the policy should read when reformed. It contains no offer to pay the proper rate of premium on the policy, if reformed.

The trial court entered no judgment reforming the policy. It was tried in the Federal Court as a case at law and before a jury. No request was made by appellees to have it set to the equity side of the court.

If the policy is to be deemed to have been reformed, what parts of it are to be considered changed, and how changed?

What about the proper rate for insurance covering a hotel? There has been no offer to pay it, and no order of the court that appellees do pay it.

What about the period for which the policy, as reformed, should run? If the policy is reformed to cover a hotel instead of a dwelling house, the new policy must be subject to the rules laid down by the Washington Surveying and Rating Bureau.

"An unprotected dwelling can be written for three years for two and one-half annual premiums, while a beer parlor can be written only on an annual basis" (Tr. 128). If the reformed policy was to be a three-year policy, it would seem to be a prohibited policy; if a one-year policy, it had expired before the date of the fire. There is no middle ground.

If it be conceded—which it is not—that this policy should be treated as a reformed policy for the term of three years, still, under the state authorities, this judgment must be reversed.

In the case of *Miller v. United Pacific Casualty Ins. Co.*, 187 Wash. 629, 60 P. (2d) 714, the case which we have just been discussing, the Supreme Court of Washington lays down the rule upon one point involved in the reformation of policies of insurance. It says:

"Respondent will, of course, be entitled to receive or deduct the amount of the added premium consequent upon the reformation." (p. 641) (Italics ours.)

The premium paid upon the $4000.00 policy was $77.00. Computed upon a reformed policy to cover a hotel, for three years, the rate would be $3.46 per hundred for each year, or $138.40 per year; or $415.20 for the term. Deducting the premium already paid, the appellees are required to pay, or have deducted from any recovery, the sum of $338.00 with interest thereon from the 10th day of August, 1935—the date of the policy.

There now stands of record this judgment against the appellant, now brought before this court for review, which unless reversed, will completely settle all rights of the parties growing out of this policy of insurance, and which takes no cognizance of the right of defendant to receive the proper premiums, if this policy is to be treated as reformed.

Justice and equity can be done only by a reversal.

In the "Miller" case which we have been discussing, where reformation was asked, the Supreme Court of Washington, although it found the respondent entitled to prevail, reversed the case because the trial court had not taken into consideration the proper pre-

mium upon the risk under the reformed policy.

Miller v. United Pacific Casualty Co.,
187 Wash. 629; 60 P. (2d) 714.

The appellees cite the case of *Reynolds v. Canton Insurance Co.*, 98 Wash. 425, 167 P. 1115, and quote just enough of it to make it appear as an authority for a so-called legal principle which it distinctly does not support. It is true that the question involves the same boat, and a substantially similar marginal clause, involved in the "Pacific Marine Ins." case, although not the same clause, because it was written on different policies issued by different insurance companies. In that case—*Reynolds v. Pacific Marine Insurance Co.*, 98 Wash. 362, 167 P. 745—it was conceded "that the clause was not wrongfully or fraudulently inserted, but was done with the authority and permission of the insured, and prayed a reformation of the contract by striking out the clause.

The "Canton" case was decided entirely upon the theory that the disputed marginal notation, if valid, worked a forfeiture of the entire policy, and that an estoppel may be asserted against the insurance company to prevent it from making such a defense. It does not present a question of whether or not a recovery may be had upon the policy as written contrary to the undertaking of the insurer. It involves

only a promise or undertaking of the insured that he will not do a certain thing. It may render the policy void if violated; and all the "Canton" case holds is that there was an estoppel to forfeit the policy. It does not hold that estoppel may be employed to extend the undertaking of the insurer under the policy. If it does, it must be considered to be overruled by the recent cases of *Carew, Shaw and Bernasconi v. General Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689; and *Charada Investment Co. v. Trinity Universal Ins. Co.*, 188 Wash., 325, 62 P. (2d) 722.

The insurer is entitled to stand on his contract under the policy as written. It may be estopped from enforcing a forfeiture of the policy because of a violation of the insured's undertaking, but estoppel will not enlarge the insurer's undertaking.

The appellees plant themselves squarely upon the contract of the policy as written. They sued upon it as written. They did not seek its reformation. Although in their answer brief they tried to "back" the idea of reformation into the case, by citation of authorities that reformation and recovery on the policy may be had under the state practice in the same action, yet they have cited no authority, and there is none, that reformation may be had without showing that there was another agreement than the one con-

tained in the policy. One statement contained in the appellees' brief states the truth, and its statement utterly destroys any assumption that claim was made for reformation, or showing made of a different agreement from that contained in the policy.

"*Neither did we attempt to show any other agreement than that contained in the policy.*" (Appellees' brief p. 11). We have italicised the quotation because of its significance.

There can be no reformation and no recovery unless the existence of a different contract is shown.

The question of how the issue shall be tried in the Federal courts is a question involving the organization of the Federal judiciary system, and is controlled by the laws of the United States and not by those of the state wherein the cause of action arose.

IV
THE COVERAGE OF THE POLICY

Appellant's brief cited cases from the Supreme Court of Washington to the effect that estoppel can be applied only where the defense is that there has been a forfeiture of the policy by breach of a condition or warranty, and can not be used to bring into being a liability contrary to the express provisions of the contract (Topic B, page 24).

A desperate attempt is made by appellees to distinguish these authorities. Discussing *Carew, Shaw and Bernasconi v. General Casualty Co.*, 189 Wash. 329, 65 P. (2d) 689, on page 10 of the answer brief they attempt to distinguish upon two grounds:

First. That the court's statement that estoppel may not bring into existence a liability not within the coverage of the policy, is limited to cases where the result would be to insure a thing not insured.

Second. That the decision is not in point, because the court did not find any fraud or mistake.

The first basis of the claimed distinction is that the action in that case was brought to extend the coverage to something other than the thing insured in the policy. Pursuing this line of argument, appellees say:

"The cases relied upon by appellant are cases where it is attempted to show that something other than that contained in the policy was insured; *that is, some other thing, or the same thing at some other or different location.*" (Italics ours.) (P. 12 of answer brief.)

The appellees seek to limit the term "coverage" solely to the actual thing which may be the subject of the loss, disregarding the fact that the limitations

upon the use to which the insured property may be put, and the time in which the loss must occur, all of which, as the court said, "*are events and conditions which under the terms of the policy must occur to obligate the insurance company to pay the loss*" (Italics ours) (p. 335 of above cited case), are as much a part of the coverage as the description of the physical property which may be the subject of a loss.

Extending their theory, the appellees claim the "Carew" case (supra) to be inapplicable because the policy insured a box inside a safe, while the contention was that the agreement was for the entire safe, and therefore the subject matter was not the same; and they contend that the doctrine announced in the "Carew" case is applicable only where applied to a distinct article, as a different house, or furniture in a different house, or a house on a different lot, and that it can not be applied to a limitation on coverage. Notwithstanding that the court in that case said, "Patently in the absence of events and conditions which, under the terms of the policy, must occur and exist in order to obligate the insurance company to pay the loss, the appellant could not recover under the policy as written" (p. 335), and that the words "events" and "conditions" clearly do not refer to the identification of the property itself, but to those limitations under

which alone the insurer will be liable—in this case, the use only for dwelling house purposes—, the appellees still claim that the opinion of the Supreme Court of Washington in the "Carew" case applies only to cases where the policy describes one property and the loss is of another.

For the purpose of determining whether appellees' interpretation of the application of the "Carew" case conforms to the intention of the Supreme Court of Washington, we propose an examination of the case of *Charada Investment Co. v. Trinity Universal Ins. Co.*, 188 Wash. 325, 62 P. (2d) 722, cited on page 335 of the opinion in the "Carew" case (supra), and see how fares the claim that the rule applies only where a distinction exists such as appellees draw between a safe and a box inside a safe, which appellees say are two different things or places.

In the "Charada" case the action was brought to reform a policy of insurance on a safe and its contents and to recover thereon as reformed. The information given to the agent was that a policy was desired which would protect valuables in the safe at all times, particularly during business hours when the door would remain open. The agent agreed to furnish such a policy. The coverage of the policy delivered (p. 329) insured against loss by persons making entry while the safe

"*is duly closed and locked*" (Italics ours). After the outside door of the safe had been opened by an authorized employee of the insured and remained open, the safe was burglarized and a compartment therein forcibly opened and money extracted. The distinction did not exist in that case which appellees seek to raise as to the "Carew" case. The safe referred to in the policy was the same safe that was burglarized. The coverage of the safe covered the compartments into which its interior was divided. The Supreme Court said the trial court correctly held that the insured whose money was taken from the box in the safe could not recover upon the policy as written, not because the safe and the box inside it were two different things or places, but "*because the safe was not closed and locked*" (Italics ours)

There is no legal distinction between a coverage clause in a policy that loss shall be payable only in case of a burglary while the door of the safe is closed and locked, and one providing that a loss of a house shall be payable only when at the time of such loss the house is being used only for dwelling house purposes. Both provisions are part of the coverage of the policy.

In *Lundeman v. United States Fidelity and Guaranty Co.*, 163 Minn. 303, 204 N. W. 159, the plaintiff claimed that the arrangement between him and the

agent of the insurance company was for a policy which would cover a loss sustained by the abstraction of valuables from his safe when it was opened by the owner under duress of robbers. The policy delivered to the plaintiff covered a loss only when occasioned by a forcible entry or entry by violence into the safe, of which force and violence there must be visible marks upon the safe, made by tools, explosives, chemicals or electricity. The owner was forced by robbers under threats of physical injury to open the safe and the robbers took valuables therefrom. It was the same safe referred to in the policy and the same safe involved in the contemplated agreement claimed by the insured to have been made with the agent which would have covered an entry procured by the exercise of duress.

The court said: "Of course the entry to the safe in the manner testified to by the plaintiff was not covered by the policy he received."

That case is cited with approval by the Supreme Court of Washington in the case of *Carew, Shaw and Bernasconi v. General Casualty Co.* (supra).

It appears that the manner in which a safe was to be opened in order for liability to attach, was a matter of the coverage of the policy. There can be no distinction between it and a provision as to the character of

the use of property upon which liability shall depend. Both are part of the coverage of the policy.

Nothing is said in the opinion in the case of *Gattavara v. General Insurance Co. of America*, 166 Wash. 691; 8 P. (2d) 421, cited on page 12 of the answer brief, which at all detracts from the rule laid down in the "Carew" case that estoppel can not be employed to extend the coverage of a policy. The question involved in the "Gattavara" case was not one of whether the loss was within the coverage of the policy, but was one of whether, in case of a breach of warranty of "sole and unconditional ownership," estoppel could be asserted to prevent a forfeiture of the policy. Mention is made in the answer brief in connection with the reference to this case that the defendant had failed to return or tender a return of the premium. In the case at bar the amount of the premium, with interest, was tendered (Tr. 38, par. VII) and refused (Tr. 53, par. VIII).

The second basis of distinction urged—the failure to find fraud or mistake in the "Carew" case—is a distinction not in point. The only materiality of fraud or mistake was upon the question of reformation. Neither fraud nor mistake is ground for a recovery contrary to the coverage of the policy sued upon.

V

INCREASED HAZARD

Under this title of their brief, the appellees make some statements which should not go unchallenged.

On page 15 it is stated that there was no evidence that a dwelling was changed into a roadhouse. There is no sinister meaning attached to the term "roadhouse." It simply means a place of public entertainment whose patronage comes to it by way of the road. It applies as much to a hotel or restaurant as to a place where any other form of public entertainment is offered.

We do contend that—the building being insured only while occupied for dwelling house purposes, and at the time of the fire being used as a beer parlor—there has been such a change of use from that for which it was insured as to increase the risk and the rate, as pointed out in *Allen v. Merchants Fire Assurance Corporation*, 179 Wash. 188, 36 P. (2d) 545, at page 194 of the official report.

On page 18 of appellees' brief the statement is made: "It must be remembered that the appellant did not insure a dwelling, but insured the building for the uses and purposes for which it was being used." This is a misstatement. The policy itself shows what the

appellant insured. It insured a two-story, shingle roof, frame building, located as described, "*while occupied only for dwelling house purposes.*" (Tr. p. 73.)

The contract, until reformed, is the sole evidence of what was insured and what the conditions of the insurance were. It certainly does not follow, as argued by the appellees, that because we are bound by this policy, and estopped from disputing it, we are estopped from claiming that the use of the insured property, to warranty a recovery, should be in accordance with the provisions in the coverage of the policy.

The appellees made no objection to the inquiry of the adjuster and the general agent as to the increased risk of a beer parlor over a dwelling, either as to their competency or as to the admission of opinion evidence. We still contend that the evidence stands uncontradicted. The testimony cited on pages 18 and 19 of appellees' brief does not eliminate the question of increased hazard. There may be a hazard avoiding the policy, although that hazard did not cause the fire. There may be no hazard in a bar, and a great amount of hazard from the crowds who flock to a beer parlor.

There seems to us one unescapable answer as to whether there was increased hazard. Under the rates

made by authority of law, the rate on the dwelling was $1.10 and on a hotel or beer parlor $3.46 (Tr. 129 and 127-128). Why the higher rate if there was no increased hazard?

VI
INTEREST

In answer to appellees' contention (answer br. p. 20) that the allowance of interest was never objected to and that this matter was never raised in the lower court, we refer this court to the judgment on page 69 of the Printed Record, where this appellant was allowed its exception because of the inclusion of interest.

The case of *Yarno v. Hedlund Box and Lumber Co.*, 135 Wash. 406, 237 P. 1002, cited in appellees' brief, page 21, is not a decision that has any bearing upon the right of a court to add interest to the verdict of a jury. In that case there was a breach of a contract under which certain sums were payable at specified times. Upon the breach, suit was brought and judgment recovered, including the payments due in the future. Holding that the worth of the sums payable in the future was more at the time of the judgment than at the times when they were payable, the case was remanded to the lower court to determine the value at the time of the judgment of the amounts payable under the contract in the future.

Yarno v. Hedlund Box and Lumber Co.,
129 Wash. 457; 225 P. 659; 227 P. 518.

The matter came again before the court in the case cited in appellee's brief, for the purpose of determining the present worth at the time of the judgment of the future payments which plaintiff was entitled to receive. The court said:

"*No claim is made here for interest prior to the rendition of the original judgment.*" (Italics ours).

The sole testimony of the value of the personal property was that of Mrs. Bilquist, an interested party, whose husband was a plaintiff, and who made no showing that she had any knowledge of the value of such property.

The jury was not bound to accept her valuation. They were at liberty to use their own judgment upon values.

Perhaps even the jury was not sufficiently credulous to believe that bar fixtures and equipment, water pumps, dishes and silverware service for 40 persons, and 8 sets of dining tables and chairs, were the "household furnishings and personal effects" covered by the policy (Tr. 74). It may have eliminated enough of articles of that, or similar, character to enable it

to include interest in the verdict, without exceeding the amount returned.

The presumption is that, if the appellees were entitled to interest, the jury included it in their verdict.

The judgment must conform to the verdict.

The judgment should be reversed and judgment entered for the appellant. Even though the appellees were to prevail, a reversal and remand would be necessary because of the right of appellant, under the laws of the state, to have the difference between the proper premium for the risk and the premium actually paid, deducted from the judgment, and the provision granting interest prior to the judgment stricken therefrom.

Respectfully submitted,

DAVIS *and* GROFF,

Attorneys for the Appellant.